83-1160

NO. _____

Office - Supreme Court, U.S.
FILED
JAN 13 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HINSON McAULIFFE, Individually;
JAMES L. WEBB, as Solicitor General for the
County of Fulton, State of Georgia,
Petitioners,

v.

PENTHOUSE INTERNATIONAL, LTD.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

GEORGE M. WEAVER
Assistant Attorney General
Counsel of Record for Petitioners

MICHAEL J. BOWERS
Attorney General

MARION O. GORDON
First Assistant Attorney General

DARYL A. ROBINSON
Senior Assistant Attorney General

Please serve:

GEORGE M. WEAVER
132 State Judicial Bldg.
40 Capitol Square
Atlanta, Georgia 30334
(404) 656-2976

QUESTIONS PRESENTED

1.

Whether a federal district court may properly decide the obscenity *vel non* under state law of a sexually explicit motion picture which is not protected speech as a matter of federal constitutional law.

2.

Whether, assuming a federal district court has jurisdiction to determine obscenity under state law, such a court may properly apply a reasonable doubt standard of proof where state civil remedies are available which would not require proof beyond a reasonable doubt and when this Court has specifically ruled that the reasonable doubt standard is not required in such proceedings.

3.

Whether, assuming jurisdiction to determine obscenity under state law, the prurient interest test of obscenity requires that sexually explicit material appeal to or sexually stimulate—as opposed to offend and repulse—the average person.

4.

Whether, assuming jurisdiction to determine obscenity under state law, the serious value test of obscenity was properly construed and applied in this case.

5.

Whether costs may be cast against a state prosecutor in his individual capacity when, acting in good faith and with probable cause, he declares his intention to enforce a valid state criminal statute.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	10
I. THE DISTRICT COURT'S EXERCISE OF SUBJECT MATTER JURISDICTION RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT AND, MOREOVER, THE ACCEPTANCE OF JURISDICTION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT	10, 11
II. THE DISTRICT COURT'S USE OF THE REASONABLE DOUBT STANDARD OF PROOF, ALTHOUGH STATE REMEDIES WERE AVAILABLE WHICH DID NOT REQUIRE PROOF BEYOND A REASONABLE DOUBT, CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT	16
III. THE DECISION BELOW THAT THE PRURIENT INTEREST TEST IS NOT MET WHEN SEXUALLY EXPLICIT MATERIALS ARE REPULSIVE AND OFFENSIVE CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT	18

TABLE OF CONTENTS (Continued)

Page

IV. THE DISTRICT COURT'S CONSTRUCTION AND APPLICATION OF THE SERIOUS VALUE TEST OF OBSCENITY CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT 23

V. THE DISTRICT COURT'S IMPOSITION OF COSTS AGAINST PETITIONER McAULIFFE IN HIS INDIVIDUAL CAPACITY RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT 28

CONCLUSION 29

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page

Cases:

Allen v. McCurry, 449 U.S. 90 (1980) 11

California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theatre, 454 U.S. 90 (1981) 8, 17, 18

Ginzburg v. United States, 383 U.S. 463 (1966) 23

Grove Press Inc. v. Christenberry, 175 F.Supp. 488 (S.D.N.Y. 1959) 27

Jacobellis v. Ohio, 378 U.S. 184 (1963) 14, 26

Jenkins v. Georgia, 418 U.S. 153 (1974) 10, 14, 26, 27

Kois v. Wisconsin, 408 U.S. 229 (1972) 13, 20, 23

McKinney v. Alabama, 424 U.S. 669 (1976) 18

Memoirs v. Massachusetts, 383 U.S. 413 (1966) 20, 26

Miller v. California, 413 U.S. 15 (1973) 13, 14, 17, 19, 20

Mishkin v. New York, 383 U.S. 502 (1966) 20

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 16, 17, 21

Parratt v. Taylor, 451 U.S. 527 (1981) 11

Penthouse International, Ltd. v. McAuliffe, 601 F.2d 1353 (5th Cir. 1980) 27

People v. Mature Enterprises, Inc., 343 N.Y.S.2d 911 (1973) 27

Perez v. Ledesma, 401 U.S. 82 (1971) 12

Pinkus v. United States, 436 U.S. 293 (1978) 20

Roth v. United States, 354 U.S. 476 (1957) 20, 21

Smith v. United States, 431 U.S. 291 (1977) 14, 22, 28

TABLE OF AUTHORITIES (Continued)

Page

Cases: (Continued)

Sorrells v. United States, 287 U.S. 435 (1932) 21

Splawn v. California, 431 U.S. 595 (1977) 25

Spomer v. Littleton, 414 U.S. 514 (1974) 9

Steffel v. Thompson, 415 U.S. 452 (1974) 11, 12, 15

United States v. Levine, 83 F.2d 156 (2nd Cir. 1936) 27

United States v. One Book Called "Ulysses", 5 F.Supp. 182 (S.D.N.Y. 1933), 72 F.2d 705 (2nd Cir. 1934) 26, 27

United States v. Powers, 307 U.S. 214 (1939) 21

Wooley v. Maynard, 430 U.S. 705 (1977) 12, 15

Statutes:

O.C.G.A. § 16-12-80 .....*passim*

O.C.G.A. § 24-4-3 .....2, 5, 17

28 U.S.C. § 1254 2

28 U.S.C. § 1331 .....2, 5, 11

28 U.S.C. § 1343 .....2, 5, 11

28 U.S.C. § 2201 .....2, 5, 11

28 U.S.C. § 2202 .....2, 5

42 U.S.C. § 1983 .....2, 5, 11

TABLE OF AUTHORITIES (Continued)

Page

Other Authorities:

Gary Arnold, "All Rogues lead to Rome," *The Washington Post*, March 31, 1980, p. B1 3

"Caligula," *Penthouse*, May 1980 ..... 3, 4

F. Cohen, 14 Criminal Law Bulletin 225 22

H. P. Fahringer, Trial 33 (May 1978) 21

Fed. R. Civ. P. 39(c) 6

Fed. R. Civ. P. 43 9

Fed. R. Civ. P. 52 29

Fed. R. Evid. 803 27

Joseph Gelmis, Review of "Caligula," *Newsday*, February 2, 1980, p. 28/Part II 4

Stanley Kauffmann, Review of "Caligula," *The New Republic*, February 23, 1980, p. 24 4

Movie Ads, *Atlanta Constitution*, January 6, 1984, p. 6P 9

Oswyn Murray, Review of "Caligula," *Times Literary Supplement*, November 28, 1980, p. 1359a .. 5

Rex Reed, *New York Daily News*, February 6, 1980 .. 27

F. Schauer, The Law of Obscenity (1976) 15, 24, 26

Variety, December 28, 1983, p. 29 5

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HINSON McAULIFFE, Individually;
JAMES L. WEBB, as Solicitor General for the
County of Fulton, State of Georgia,
Petitioners,

v.

PENTHOUSE INTERNATIONAL, LTD.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners Hinson McAuliffe and James L. Webb respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on October 17, 1983.

OPINIONS BELOW

The opinion of the equally-divided *en banc* Court of Appeals for the Eleventh Circuit, which according to that court affirms by operation of law the decision of the district court, is reported at 717 F.2d 517. The earlier panel decision of the Eleventh Circuit which reversed the

decision of the district court is reported, along with the subsequent order granting rehearing *en banc*, at 702 F.2d 925. The opinion of the District Court for the Northern District of Georgia is unpublished. Reproductions of all of these opinions appear in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on October 17, 1983. This petition for certiorari was filed within 90 days of that date. Note that this judgment was entered after the original panel decision, which was issued on April 11, 1983, was vacated by an order granting rehearing *en banc*. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the following statutes: 28 U.S.C. §§ 1331, 1343, 2201, 2202; 42 U.S.C. § 1983; O.C.G.A. §§ 16-12-80, 24-4-3. Pertinent parts of these statutes are reproduced in the appendix to this petition.

STATEMENT OF THE CASE

The motion picture "Caligula" is a sexually explicit motion picture which is owned by Penthouse International, Ltd. It is "hard-core pornography" as that expression has been used by this Court. The district court described the content of the film as follows:

> Opening with scenes suggesting Caligula's incestuous relationship with his sister, Drusilla, the film quickly progresses to the island grotto of the Roman Emperior [sic] Tiberius, Caligula's grandfather, where sexual acts and aberrations of all types are graphically depicted. From thence forward, the film is a dizzying display of bodies, genitals, orgies, heterosexual and homosexual activity, masturbation, bodily

> functions, and sexual conduct and excesses of all varieties.
>
> Sexual conduct is not all that is revealed, however. . . . From the assumption of power by Caligula to his final assassination by the Praetorian guards, the film is awash with blood and gore. . . . There are scenes of cruel and violent acts *ad nauseum*, including disembowelment, castration, decapitation, rape, and murder.

(R. 330). Calling the movie "appalling" and "repulsive," one movie critic described the movie as containing in addition to "hard-core sex": "disemboweling, beheading, castration, a gallery of naked freaks, torture, a little necrophilia, a little urolagnia, a vomiting scene in close-up *and* slow-motion, infanticide by head-bashing ad nauseum." [1] Respondent itself does not euphemize the content of the movie, but rather proclaims:

> Relishing the sensual pleasures of nymphs and satyrs alike, Caligula hosted riotous orgiastic feasts in his palace. Graphically depicted in the film, these scenes feature mountains of writhing bodies indulging in every conceivable sexual excess.[2]

Respondent describes another scene in the following terms: a "boy [is] disemboweled and castrated . . . his testicles [sent] to his widow as a token of his undying love . . . [and h]is penis . . . thrown to the dogs." In addition, Penthouse notes the suggestion of child pornography in this description of one scene: "The aged and ailing Tiberius fondles his slave children in the privacy of his

[1] Gary Arnold, "All Rogues lead to Rome,", *The Washington Post*, March 31, 1980, p. B1.

[2] "Caligula," *Penthouse*, May 1980, p. 81. According to its masthead, *Penthouse* is published by Penthouse International, Ltd. Note that the district court admitted excerpts from this same issue of *Penthouse* into evidence. (T. 762, 1401).

pleasure grotto."[3]

"Caligula" is perhaps the most expensive hard-core pornographic movie ever made. According to Penthouse International, Ltd., the movie which was filmed in Italy took four years and $17,500,000 to make. In fact, according to Bob Guccione, the owner of Penthouse International, Ltd., and the editor of *Penthouse* magazine, the final cost was around $22,000,000.[4] Guccione also said, "[T]his film deviates in so many ways from every other film ever made." [5] Several film critics have also noted the unusual aspects of this film. In the words of one:

> With its $17 million budget, it is believed to be the most lavish pornographic movie ever made. It's the first hard core pornographic movie on record that features legitimate performers. . . .[6]

It should also be noted that the well-known entertainment figures who were involved in the production of "Caligula" have disavowed the film. (R. 331).[7]

It is also noteworthy that this expensive sexually explicit movie has been widely distributed. According to trial testimony, "Caligula" has been exhibited in numerous foreign countries and, in its first eleven months of

---

[3] *Id.*, at 82. Of course under the "taken as a whole" elements of the obscenity test, no part of the content of a work, including violence, may be disregarded.

[4] *Id.*, at 6, 114.

[5] *Id.*, at 116.

[6] A review of "Caligula" by Joseph Gelmis, *Newsday*, February 2, 1980, p. 28/Part II. Review of "Caligula" by Stanley Kauffmann, *The New Republic*, February 23, 1980, p. 24 ("To my knowledge *Caligula* is the first fiction film in general release that contains many, many scenes of sexual activity photographed explicitly. Every variety of activity.").

[7] *Penthouse*, May 1980, p. 113f.

release, grossed $9,256,924.50. (T. 725).[4] According to recent sources, it has now grossed $10,352,047.00.[5]

On December 17, 1980, Penthouse International, Ltd., filed a complaint against petitioner Hinson McAuliffe, the elected solicitor of Fulton County, Georgia. McAuliffe was named in both his individual and official capacities. The complaint was filed in the Atlanta Division of the United States District Court for the Northern District of Georgia. (R. 4). In its complaint, respondent asked for a declaratory judgment that the motion picture "Caligula" is not obscene within the meaning of O.C.G.A. § 16-12-80, formerly Ga. Code Ann. § 26-2101. Respondent also sought an injunction prohibiting petitioner McAuliffe from initiating or conducting any prosecution under O.C.G.A. § 16-12-80. Penthouse claimed jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201, 2202; and 42 U.S.C. § 1983. Penthouse also alleged that in a pleading filed in a lawsuit is New York concerning the importation of "Caligula" McAuliffe stated that if the motion picture were distributed in Fulton County, Georgia a prosecution would be initiated. As a result, respondent alleged that it was unable to obtain exhibitors in Fulton County. In his answer, petitioner McAuliffe made what he considered a compulsory counterclaim for a declaratory judgment that "Caligula" is obscene. (R. 45).

McAuliffe filed a demand for jury trial. (R. 56). On March 31, 1981, the district court struck this demand, but ruled that it would impanel an advisory jury under

[4] Of course, the witness who testified to this did not know how many people had walked out of the movie before it was completed. According to one reviewer, about one-third of the audience walked out on what was probably a typical showing. Review of "Caligula" by Oswyn Murray, *Times Literary Supplement*, November 28, 1980, p. 1359a.

[5] *Variety*, December 28, 1983, p. 29.

Fed. R. Civ. P. 39(c). (R. 148). The trial began before an advisory jury on April 13, 1981 and was concluded on April 25, 1981.

At the trial, both petitioner and respondent introduced the testimony of numerous expert witnesses. They testified about all aspects of the three-part obscenity test. Most were university professors.

Much of the expert testimony concerned the issue of prurient appeal. As the district court noted, there was remarkable agreement between petitioners' and respondent's witnesses on this subject. They all testified that the average person would find the movie shocking, repulsive, and offensive. As discussed later in this brief, the district court held that in order to violate the prurient interest test a work had to arouse or stimulate the average person. Employing this erroneous interpretation of the test, the district court found that because the movie was repulsive and shocking it did not appeal to the prurient interest.

Since the district court found "Caligula" to be offensive to the average person under the pruriency test, it is not surprising that the court found the movie to violate the patent offensiveness or "hard-core" test. The court found that the film depicted in a patently offensive way at least some of the acts of sexual conduct specified in the Georgia obscenity statute. (R. 335).

The parties offered considerable evidence on the serious value test of obscenity. Because the court found the movie to lack serious literary and scientific value, there is no need to discuss the evidence on those points.

Considerable attention at trial was focused on the issue of serious artistic value. In the district court's view, the most important witnesses were Dr. Sklar for respondent

and Dr. Fletcher for petitioners. Dr. Sklar defined "serious artistic value" as follows:

> [It is] an effort to communicate an idea, a mood, or an emotion, or more likely a combination of ideas, moods, or emotions through the various elements of film . . . .

(T. 347). Dr. Fletcher, on the other hand, said that a film drama has "serious artistic value" when "it brings to our attention something we haven't realized before or it makes clearer for us something that had not been so clear before or it gives us a sensitivity to something we had not been sensitive [to] before . . . ." (T.1106-7). He also stated that to have serious artistic value a "work would have to manifest both unity and integrity with respect to advancing a theme." (T. 1109). The district court agreed with Dr. Fletcher that "Caligula" is a "resounding artistic failure." (T. 340). However, the court adopted Dr. Sklar's broad definition of "serious artistic value" and, on that basis, found the movie to possess such value. (T. 338-40).

Considerable evidence was also adduced on the related question of serious political value. The several experts who addressed this subject generally analyzed the movie with respect to the theme "power corrupts." They offered various opinions as to whether the movie contained such a theme and, assuming it did, whether the theme was seriously advanced or pursued. The district court found that because the movie contained "political, historical, and social themes and sub-themes" it had serious political value. The court did not discuss whether there was any serious intent to convey a political message or whether any serious political message was in fact communicated. (T. 341).

It should also be noted that the district court employed a reasonable doubt standard of proof. The question of what standard of proof should be applied was raised prior to trial (R. 230) and each party filed a brief in support of its position. (R. 167, 253). The district court rejected petitioners' position and ruled that unless it were established beyond a reasonable doubt that "Caligula" is obscene, Penthouse would prevail. The district court charged this standard to the advisory jury (T. 8, 1511), and of course applied it in its own decision. (R. 344 n.4). The petitioner objected to the charge. (T. 33, 1526). It should also be noted that the special verdict form submitted to the advisory jury expressly employed the reasonable doubt standard. (R. 299). The use of this standard is in direct conflict with *California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theatre*, 454 U.S. 90 (1981).

The district court found that "Caligula" is not obscene. The advisory jury returned a special verdict that the movie does not, beyond a reasonable doubt, appeal to the prurient interest although it does, beyond a reasonable doubt, violate the patent offensiveness and serious value prongs of the obscenity test found in O.C.G.A. § 16-12-80. (R. 299). The district court entered its final order on May 15, 1981. It found that, although "Caligula" violates the patent offensiveness prong of the obscenity test and lacks serious literary and scientific value, it is not obscene because there is reasonable doubt as to whether it appeals to the prurient interest and whether it lacks serious artistic and political value. (R. 327). Based on these findings the district court issued a declaratory judgment that "Caligula" is not obscene under O.C.G.A. § 16-12-80. The court assumed that its declaratory judgment would be obeyed and, therefore, denied Penthouse's claim for injunctive relief.

While the case was under submission to the Eleventh Circuit, petitioner McAuliffe retired from office and was replaced by petitioner James L. Webb. Under Fed. R. App. P. 43(c), Webb was automatically substituted for McAuliffe to the extent that McAuliffe was named in his official capacity as Solicitor General of the State Court of Fulton County. However, McAuliffe was also named in his individual capacity. Even though only injunctive and declaratory relief with respect to his acts as solicitor were sought, McAuliffe apparently continues as a party to this appeal in his individual capacity.[10] Note also that costs were cast against petitioner McAuliffe in both his official and individual capacities. (R. 342, 345).

On April 11, 1983, a panel of the Eleventh Circuit reversed the decision of the district court. In their original

[10] In some circumstances, a substitution of parties may render the action moot. In *Spomer v. Littleton*, 414 U.S. 514 (1974), this Court vacated and remanded an action against a State's Attorney in Illinois, who had been named in his individual and official capacities, but had been succeeded by a new State's Attorney prior to the Supreme Court's decision. The Court noted that although the State's Attorney was sued in his official capacity, there was "nothing in the record upon which we may firmly base a conclusion that a concrete controversy" existed between the plaintiffs and the new State's Attorney. Thus, the Court remanded for a determination of mootness and whether the plaintiffs desired and should be permitted to amend their complaints so as to claim relief against the new State's Attorney. *Id.*, at 520-2.

This case should not be remanded for a determination of mootness. Counsel is authorized to state that the position of the new Solicitor General is identical to that of his predecessor. In other words, James L. Webb would also undertake prosecution of any person or organization which attempted to exhibit "Caligula" in Fulton County. Thus, no purpose would be served by remanding this action. It should be noted that this issue was presented to the Eleventh Circuit but that court did not choose to remand for a determination of mootness. It should also be pointed out that at the time of the preparation of the instant petition, the uncut version of "Caligula" was being exhibited in Fulton County. *See* Movie Ads, *Atlanta Constitution*, January 6, 1984, p. 6P. The current Atlanta run of the motion picture has continued for several months.

brief in the Court of Appeals, petitioners raised, *inter alia*, the district court's striking of their demand for jury trial, the ruling that "Caligula" is not obscene (and all subsidiary questions like the standard of proof), and the casting of costs against petitioner McAuliffe in his individual capacity. The panel noted that in its complaint respondent claimed that "Caligula" was not obscene under a Georgia criminal statute as constitutionally applied. The panel held that the district court had subject matter jurisdiction only to decide whether the motion picture was protected as a matter of "federal constitutional law." 702 F.2d 928-9. In support of its disposition, the panel cited *Jenkins v. Georgia*, 418 U.S. 153 (1974), in which the Court held that another motion picture was protected "as a matter of constitutional law." *Id.*, at 161. The panel also determined that the district court should not have received evidence (other than the film) and attempted to decide factual issues. 702 F.2d 928-9. Based on these conclusions, the panel ordered the case remanded for a determination of whether the movie was protected as a matter of federal constitutional law.

The Eleventh Circuit granted respondent's petition for rehearing *en banc* and the parties rebriefed and reargued the case. Petitioners reasserted all of their original arguments and also argued that the panel's decision was sound and should be adopted by the full court. On October 17, 1983, the twelve-member court announced that it was equally divided on proper disposition. Therefore, according to the *en banc* court, the judgment of the district court was affirmed by operation of law, although the affirmance has no precedential value. 717 F.2d 517.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT'S EXERCISE OF

SUBJECT MATTER JURISDICTION RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT AND, MOREOVER, THE ACCEPTANCE OF JURISDICTION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

One who has been the object of genuine threats of state prosecution may at least in some circumstances seek a federal declaratory judgment that the state statute in question may not be constitutionally applied to his conduct. As the Court made clear in *Steffel v. Thompson*, 415 U.S. 452, 475 (1974), one may seek such relief even though the statute is facially constitutional and the requirements for injunctive relief are not met.

Although there is no question in the instant case but that respondent was the subject of a genuine threat of prosecution, *Steffel* does not support the exercise of jurisdiction here.[11] In that case, Mr. Steffel had been threatened with prosecution under the Georgia criminal trespass statute for distributing handbills against the Vietnam War at a shopping center in the Atlanta area. It was apparent from the stipulated facts that the petitioner had violated, and intended to continue violating, the terms of the trespass statute—i.e., his conduct met all elements of the statute. The issue presented to the federal court was whether, even though Mr. Steffel's conduct satisfied all of the elements, the statute could be

[11] Petitioners denied in their answer that the district court had jurisdiction under the Civil Rights Act, 28 U.S.C. § 1343, 42 U.S.C. § 1983. The Civil Rights Act was not intended to provide relief in the circumstances presented here where state procedures are readily available to resolve the dispute. *See Allen v. McCurry*, 449 U.S. 90 (1980); *Parratt v. Taylor*, 451 U.S. 527 (1981). Petitioners maintain that the district court's jurisdiction to decide the constitutional fact of obscenity arises only under 28 U.S.C. §§ 1331, 2201.

constitutionally applied to his speech activities. As the Eleventh Circuit panel below noted:

> *Steffel* would have been a much different case had it been disputed whether the plaintiffs would make a "knowing" entry upon the defendant's land within the meaning of the state trespass statute. Problems of federalism and case or controversy would have then arisen.

702 F.2d at 929. The Court itself pointed out in *Steffel* that if it were determined that the statute could not be constitutionally applied the result would be that the statute is "incapable of being constitutionally enforced to the *full extent of its purport.*" *Steffel, supra, quoting Perez v. Ledesma*, 401 U.S. 82, 125-6 (1971) (separate opinion of Brennan, J.) (emphasis added). The issue presented in *Steffel* then was not whether the petitioner's conduct satisfied the elements of the trespass statute but whether, even though Mr. Steffel's conduct clearly violated the statute, the statute could be "constitutionally applied to the full extent of its purport." *Id. See also Wooley v. Maynard*, 430 U.S. 705 (1977) (federal injunctive relief authorized against prosecution for conduct which, although it clearly violated a state statute, was nevertheless constitutionally protected).

The only issue which Penthouse presented to the district court here was whether the elements of the Georgia obscenity statute were satisfied by "Caligula." Unlike in *Steffel, supra*, and *Wooley, supra*, Penthouse did not claim or present any credible evidence that, for reasons outside of the question of satisfaction of the elements of the offense, no valid conviction could be obtained against the exhibition of "Caligula." The claim was not that the Georgia obscenity statute could not be applied "to the full extent of its purport," but rather that its purport or

elements were not met. As the Eleventh Circuit panel below pointed out, for the district court to attempt to decide factual issues of element satisfaction is "to countenance the bypass of the entire state criminal justice system so a federal court could determine the 'guilt or innocence,' under a valid state criminal statute, of one who proposes to exhibit 'Caligula.' " 702 F.2d at 928. The panel went on to say:

> Notions of comity and federalism preclude us from recognizing such a cause of action, especially in an area in which local community standards are so crucial.

Id. These comments by the panel demonstrate the extraordinary importance of this case to the survival and integrity of the state criminal justice systems.

Although there are factual issues involved in any determination of obscenity *vel non*, there are also legal elements. In the Court's watershed decision in *Miller v. California*, 413 U.S. 15, 24 (1973), the Court laid down the three part test of obscenity which contains the prurient appeal, patent offensiveness, and serious value elements. As the Court pointed out, these elements or guidelines are for the "trier of fact." Nevertheless, other decisions of the Court make plain that there are legal, non-factual issues implicit in any obscenity determination. Each of the three elements of obscenity are reviewable by appellate courts on an independent basis. In *Kois v. Wisconsin*, 408 U.S. 229 (1972), the Court in applying an earlier version of the obscenity test held that the "dominance" of the theme of allegedly obscene material is a "question of constitutional fact," requiring independent

review of the materials at issue while giving "due weight and respect" to conclusions of the trial court and lower appellate courts. *Id.*, at 232. Later, in *Jenkins*, *supra*, the Court reversed an obscenity conviction and noted:

> Even though questions of appeal to the "prurient interest" or of patent offensiveness are "essentially questions of fact," it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is "patently offensive."

Id., at 160. The Court reached the following holding:

> We hold that the film ["Carnal Knowledge"] could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendments because it is obscene.

Id., at 161. *See also Jacobellis v. Ohio*, 378 U.S. 184, 190 (1963) ("[T]his court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected."). It is significant that in *Jenkins*, the Court reversed on the basis of the patent offensiveness, or hardcore, prong. The Court found that the required acts of sexual conduct were not present. The Court has also noted in other cases that this prong of the test establishes an easily reviewable constitutional minimum as to what may be found to be obscene as a matter of fact. *See Smith v. United States*, 431 U.S. 291, 301, 305 (1977). It is clear what when a court makes a determination under any of the three prongs as to whether material is protected as a matter of constitutional law it is not resolving the factual issues involved in obscenity determinations. In other words, the court is not deciding whether the materials are obscene, but whether the materials even create fac-

tual issues as to obscenity. The question is whether the materials may constitutionally be found to be obscene, not whether the materials actually—as a matter of fact—are obscene. *See* F. Schauer, The Law of Obscenity (1976), pp. 113-5, 147-53.

Petitioner submits that the test suggested by the Eleventh Circuit panel for deciding whether a plaintiff is entitled to a federal declaratory judgment against a threatened state obscenity prosecution is sound and should be adopted by this Court. The panel suggested that in such circumstances a plaintiff should not be entitled to federal declaratory judgment unless the determination of constitutional law referred to above establishes that his conduct could not be the subject of a valid conviction. This accords with *Steffel*, *supra*, and *Wooley*, *supra*, in which no factual issues regarding satisfaction of the elements of the statutes were presented. As the panel pointed out, a federal court should not be allowed to resolve factual issues involved in prospective violations of state obscenity or other criminal statutes.

For the above-described reasons, the courts below erred in allowing the extension of federal relief. The district court should have been allowed only to determine if "Caligula" was protected as a matter of constitutional law, not whether it was in fact obscene. For a federal court to resolve the factual issues implicit in a determination of guilt or innocence under a state criminal statute is a disturbing and dangerous precedent. It is a clear expansion of *Steffel*, *supra*, and threatens the very survival of state criminal justice systems. Under the example furnished by the record in this case, if one who is threatened with prosecution under a valid state criminal statute can beat the prosecutor to federal court and raise

some constitutional issue, the federal court may then receive evidence and resolve factual questions involved in the issue of guilt or innocence.

II. THE DISTRICT COURT'S USE OF THE REASONABLE DOUBT STANDARD OF PROOF, ALTHOUGH STATE REMEDIES WERE AVAILABLE WHICH DID NOT REQUIRE PROOF BEYOND A REASONABLE DOUBT, CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

As pointed out in the Statement of the Case, the district court employed a reasonable doubt standard of proof in the trial of this case. Even assuming that the court had jurisdiction to resolve factual questions, the use of this standard of proof was legal error. Note that the district court both charged this standard to the advisory jury and, employed it in its own opinion. (T. 8, 1511; R. 344 n.4).[12]

The State of Georgia provides a civil nuisance remedy against obscenity. As this Court noted in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973):

> Georgia case law permits a civil injunction of the

---

[12] In the Court of Appeals, respondent argued that the district court gave petitioners the benefit of a lesser standard of proof. Respondent argued that even if it was error to apply the reasonable doubt standard, the error was harmless because the district court's findings of fact were not limited to the reasonable doubt standard.

This argument is, to say the least, not convincing. That the district court stated that it found the movie not to be obscene, rather than that it found there was a reasonable doubt as to whether the movie is obscene, is of no significance. The court had made it clear that it was using a reasonable doubt standard. Moreover, findings under a reasonable doubt standard are usually stated in the manner in which the district court stated its findings. Note that even though the jury in the instant case was advised to apply a reasonable doubt standard and this standard was expressly stated in its special verdict, the district court said that "the jury found . . . that the movie,

> exhibition of obscene materials. [Cits. omitted]. While this procedure is civil in nature and does not directly involve the state criminal statute proscribing exhibition of obscene material, the Georgia case law permitting civil injunction does adopt the definition of "obscene materials" used by the criminal statute.

Id., at 54. In this civil proceeding a lesser standard of proof than reasonable doubt would have been used. *See* O.C.G.A. § 24-4-3.

By declaring "Caligula" not to be obscene, the district court effectively precluded the use of the Georgia civil nuisance remedy. The district court declared that the movie was not obscene under the definition of "obscene materials" set forth in *Miller*, *supra*, and O.C.G.A. § 16-12-80. The use of the civil nuisance remedy is precluded because, as the Court pointed out in the above quotation from *Paris Adult*, the same definition of "obscene materials" is employed in civil nuisance actions.

After the trial of the instant case, this Court ruled in another case that the United States Constitution does not require that obscenity be proven beyond a reasonable doubt in a civil case. In *California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theatre*, 454 U.S. 90 (1981), a public

---

taken as a whole, does not appeal to the prurient interest." (R. 331). This shorthand rendition of the jury's finding accords with common usage, as for example when we say that the jury in a criminal case found the defendant not guilty instead of found that there was a reasonable doubt as to whether he was guilty. In addition, it should be noted that the district court expressly relied on the jury's finding that there was a reasonable doubt as to whether "Caligula" satisfied the prurient interest test. (R. 331-2). Indeed, that is the whole purpose of an advisory jury. Note that the dissenting judge on the panel below said that because the district court charged the advisory jury to apply a reasonable doubt standard, "[i]t is reasonable to assume that the trial judge applied th[is] standard [. . .] in his own fact findings." 702 F.2d at 930. Thus, it is clear that the district court's decision is inextricably wed to the reasonable doubt standard.

nuisance action against the exhibition of allegedly obscene motion pictures, the Court held:

> [T]he Court has never required the "beyond a reasonable doubt" standard to be applied in a civil case. . . .
>
> Thus while a State may require proof beyond reasonable doubt in an obscenity case, that choice is solely a matter of state law. The First and Fourteenth Amendments do not require such a standard.

Id., at 93-94. A majority of the Court rejected the position of Justice Brennan, expressed in *McKinney v. Alabama*, 424 U.S. 669, 683-4 (1976) (Brennan, J., concurring), that obscenity must be proven even in a civil proceeding beyond a reasonable doubt. The district court in the instant case expressly relied upon this concurring opinion in reaching its decision to apply the reasonable doubt standard. (R. 344 n.4). At a minimum reversal on the basis of *Mitchell Brothers'* is mandated here.

Therefore, the courts below have decided an important federal question in a way which conflicts with applicable decisions of this Court. Certainly, if obscenity laws are to have any weight and effect they must be applied correctly. In this of all cases the laws should be applied correctly because, as pointed out in the Statement of the Case, "Caligula" is perhaps the boldest pornography ever dumped into American society.

III. THE DECISION BELOW THAT THE PRURIENT INTEREST TEST IS NOT MET WHEN SEXUALLY EXPLICIT MATERIALS ARE REPULSIVE AND OFFENSIVE CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

In order to be obscene, material must be such that " 'the average person, applying contemporary communi-

ty standards' would find that the work, taken as a whole, appeals to the prurient interest." *Miller, supra*, at 24. This prurient appeal requirement is, of course, restated in the Georgia obscenity statute. O.C.G.A. § 16-12-80 (b)(1).

The district court below interpreted the prurient interest test to require that "Caligula" must "sexually stimulate" or arouse "erotic interest," in the average person (R. 332-4). The district court instructed the advisory jury as follows:

> Thus, if there exists a reasonable doubt as to whether or not the movie "Caligula" *predominately appeals to the prurient interest of the average person*, applying contemporary community standards, you should reflect that fact in your answer contained in the special verdict. . . . you are to consider the *appeal of this material to the average person*, the person with average sexual instincts, in determining whether or not this material appeals predominately to the prurient interest or is patently offensive.
> (emphasis added)

(T. 1514, 1516). Petitioner objected to this charge both before and after it was given (T. 1378-97, 1526) and even filed a post-trial brief on the issue. (R. 300). Citing the agreement among the expert witnesses that "Caligula" would repulse and offend the average person, the district court held that the movie did not satisfy the prurient interest requirement. The court found: "*Caligula* . . . does not . . . appeal to a prurient interest in sex. The tendency of Caligula instead is to inhibit sexual stimulation." (R. 335). It is also significant that the district court expressed confusion about the meaning of the prurient interest test. The court said: "The concept of prurient appeal has never been adequately defined by the Supreme Court." *Id.*

This Court's past decisions demonstrate that the prurient appeal test does not require that material appeal to or stimulate the average person. Rather, the Court's decisions show that the test requires that the average person would conclude, if he viewed the material, that it appeals to a prurient sort of interest. Under the Georgia law, this would mean that the average person must conclude that the material appeals to "a shameful or morbid interest in nudity, sex, or excretion." O.C.G.A. § 16-12-80(b)(1). In none of the Court's obscenity decisions has it stated the prurient interest test in such a fashion so as to require that material appeal to or stimulate the average person. *Roth v. United States*, 354 U.S. 476, 489 (1957) ("whether to the average person . . . the material . . . appeals to prurient interest"); *Kois, supra*, at 232 ("whether or not the 'dominant' theme of the material appeals to prurient interest"); *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966) (whether "the dominant theme of the material . . . appeals to a prurient interest in sex"); *Miller, supra*, at 24 ("whether 'the average person . . .' would find that the work . . . appeals to the prurient interest").[13] The sum of these decisions is that material does not have to appeal to or stimulate the average person in order to be obscene but must be such that the average person would find it to be an appeal to a prurient sort of interest.

In *Mishkin v. New York*, 383 U.S. 502 (1966), the Court rejected an interpretation of the pruriency test to the effect that materials which do not "stimulat[e]" the

[13] Note that in *Pinkus v. United States*, 436 U.S. 293, 301-2 (1978), the trial court gave an instruction which used the language "prurient interest of the average person." The case before the Court was an appeal by a criminal defendant. The propriety of this charge was not an issue before this Court.

average person but "disgust and sicken" him cannot be obscene. *Id.*, at 508. Although that case unlike the instant one involved materials "designed for and primarily disseminated to a clearly defined deviant sexual group" ("Caligula" has been distributed to the public at large), the same principle applies here. Hard-core pornography cannot be allowed to excape regulation simply because it is so bad that it is offensive and repulsive to the average person.

Other considerations also support petitioners' position. Well known rules of statutory construction require that statutes be interpreted so as to give their provisions meaningful effect and not in a manner which would lead to absurd or unreasonable consequences. *United States v. Powers*, 307 U.S. 214, 217 (1939); *Sorrells v. United States*, 287 U.S. 435, 447 (1932). To interpret the pruriency test to require that material arouse or appeal to the average person frustrates legislative intent and renders the law meaningless by permitting material that is most violative of community standards to go unregulated. If material is so far beyond community standards that it offends and repulses the average person then, under the district court's interpretation, it cannot be obscene. Obviously this vitiates the purpose of obscenity laws to prevent the infringement of community standards by explicit materials. *See, Roth, supra*, at 487 n.20; *Paris Adult, supra*, at 57-8.[14]

[14] It is significant that a leading obscenity defense lawyer has explained how the interpretation of the pruriency test taken by the district court can be used to defend the most abhorrent material. He has said: "(A)n argument can be made by the defense that it would not appeal to the average person's or juror's" sexual desires. Consequently, an acquittal is mandated. . . ." H. P. Fahringer, Trial 33 (May 1978). An account of how Fahringer used this tactic, with a trial court's help, to frustrate the New York obscenity law and obtain findings of non-obscenity on graphic homosexual and bestiality

The district court's interpretation of the pruriency test also makes nonsense of the obscenity law by producing contradictions in the very definition of "obscene materials." *First*, as mentioned above it produces a contradiction between the community standards and the prurient appeal elements involved in the pruriency test. As long as material is so violative of community standards that it disgusts or repulses the average person, it is not obscene under the district court's formulation. *Second*, a contradiction is generated between the prurient appeal and patent offensiveness prongs of the test. Under the patent offensiveness requirement, the material must, applying contemporary community standards, be patently offensive to the average person. *Smith*, *supra*, at 300-1. But at the same time, under the district court's interpretation, the material must appeal to or stimulate the average person. This obviously makes nonsense of the law.

For the above-stated reasons it is clear that the courts below have decided an important question of federal law in a way in conflict with the applicable decisions of this Court. Obviously, this question is important because if obscenity laws are to have any meaning and effect they must be interpreted in a manner consistent with this Court's prior decisions and with reason. The importance of a correct interpretation of the prurient interest test is

---

movies is found in another article. F. Cohen, 14 Criminal Law Bulletin 225. Fahringer admitted that the movies were awful and that even he had difficulty looking at them, but argued that they did not arouse the average person and thus did not appeal to prurient interest. The court charged a definition of "prurient appeal" which coincided with the defense argument. *Id.*, at 230. The jury was forced to acquit the defendants because, as one juror said afterwards, the movies did not appeal to the interest of ordinary adults. *Id.*, at 231.

again highlighted in this case by the brazenness of this hard-core pornographic movie.

IV. THE DISTRICT COURT'S CONSTRUCTION AND APPLICATION OF THE SERIOUS VALUE TEST OF OBSCENITY CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The district court interpreted and applied the serious value test in such a manner as to make the test meaningless and of no effect. As pointed out in petitioners' Statement of the Case, the district court defined "serious artistic value" as "an attempt to communicate ideas, moods, and emotion through the different elements of film." And, the court found "Caligula" to have serious political value because it "contains political, historical, and social themes and subthemes." (R. 338-43). Obviously, this approach by the district court fails to impose any meaningful restraint on sexually explicit materials. Even the most abhorrent and outrageous pornography could easily be found to be "an attempt to communicate ideas, moods, and emotion" and to contain "political, historical, and social themes and subthemes." The ideas, themes, etc., could themselves be pornographic. The district court's approach fails to guard against obscene materials which contain apparently serious elements inserted only as a sham. *See Kois, supra*, at 231 ("A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication. . . ."); *Ginzburg v. United States*, 383 U.S. 463 (1966).

A proper view of serious value—including of course serious artistic and political value—must accommodate two factors. One is the sort of effort or purpose that the material represents. Is it an attempt to make a serious

product? The other factor is whether the material effectively carries out its purpose, whether it communicates its message. The assessment of serious value is generally made with respect to the theme(s) or apparent theme(s) of a work. Schauer, *supra*, at 147. It is appropriate to keep in mind that almost all witnesses in the instant case analyzed "Caligula" with respect to the theme "power corrupts."

Consider the question of serious intent or purpose. Schauer says that the purpose behind the material is important. He says, "The value to be serious, must be in a significant amount. It must also represent a major purpose of the material . . . . [A]n analysis of the relationship of the serious matter to the sexually explicit matter . . . will inevitably involve a determination of intent as well as effect." *Id.*, at 147; *see also* 288. Even though the district court gave particular weight to the testimony of Dr. Sklar who defined "serious artistic value" totally in terms of the intent or purpose of the material (T. 352), the district court apparently did not understand this test. Whenever petitioners sought to inquire about the intent or purpose of the makers of "Caligula" the district court stopped them. (e.g., T. 376-81, 450). The district court even prevented them from arguing this point to the advisory jury. (T. 1466-7). Moreover, the district court excluded evidence offered by petitioners that tended to show that "Caligula" is a commercial exploitation of erotica solely for the sake of its prurient appeal. (T. 1140). The evidence consisted of promotion or advertising of the movie by Penthouse. While excluding petitioners' evidence of advertising, the district court admitted other evidence on the same subject when offered by respondent. (T. 727). Clearly, the District Court should have considered petitioners' evidence of adver-

tising because this Court has held that such evidence is significant to the serious value issue. *Splawn v. California*, 431 U.S. 595, 598-9 (1977); O.C.G.A. § 16-12-80(d). On the question of serious political value, the district court's treatment of the evidence on the historical accuracy of the film showed its failure to understand the importance of intent or purpose. Respondent claimed in its complaint (R. 3) and throughout the case that the movie was historically accurate. It justified the explicit sex and violence by saying that it was merely a faithful rendition of historical fact. (T. 453f.). But, respondent's witness on historical accuracy, Dr. Thomas Africa, admitted that the movie omitted most of the political events of "Caligula's reign and, moreover, that it contained much sex and violence for which there was no historical evidence. Dr. Thomas Burns of Emory University testified for petitioners in the same manner. He asserted emphatically that the movie was not historically accurate, was a total distortion of Roman history, and in no measure faithfully represented political events in the reign of "Caligula." (T. 831f.). Although the district court is correct in saying that historical accuracy is neither a necessary nor a sufficient condition for serious political value, the evidence on this question was extremely important because it related to whether the film is a serious effort to communicate a political message. If the movie is a gross distortion of Roman history surfeited with a welter of gratuitous sex and violence—as the evidence on balance demonstrated—it is not a serious effort. In summary, a proper understanding of the question of serious intent or purpose reveals that the district court erred in finding that "Caligula" has serious artistic and political value.

The effect of the movie is also important to serious

value. *See* Schauer, *supra*, at 147. And, it is significant that the advisory jury found the movie to lack serious artistic or political value. (R. 299, 299A). The jury was especially qualified to measure the effect, or success in communicating, of the film. Yet its findings were ignored. Several witnesses on artistic value stated that the success of the movie in communicating or presenting its theme was crucial to serious artistic value. For example, Drs. Cripps, for respondent (T. 435f.), and Fletcher, for petitioners (T. 1106f.), generally testified that the success of a film in presenting its message is the way in which serious artistic value *vel non* is gauged, although Cripps found "Caligula" to have serious artistic value while Fletcher did not. The district court apparently agreed with Dr. Fletcher inasmuch as it held the movie to be a "resounding artistic failure." (R. 340). But, of course, the district court did not agree that the effect of a movie is important to serious artistic value. Perhaps the most probative evidence of serious artistic value *vel non* is the critical acclaim (or lack thereof) a work receives. Petitioners offered in evidence some sixteen published critical reviews of "Caligula." Although Penthouse agreed that critical acclaim is important to serious value (R. 186) and the State filed an extensive brief in support of their admissibility (R. 192), the district court excluded them. (T. 1349). Pretrial notice of intention to offer hearsay was given by petitioners (T. 118, 155) and numerous precedents allowing such evidence were cited. For example, in the following cases critical acclaim was considered in regard to the obscenity *vel non* of various works: *Jenkins*, *supra*, at 158-9 (reviews of movie "Carnal Knowledge"); *Memoirs*, *supra*, at 447 n.2, 3, (1966) (Clark, J., *dissenting*) (reviews of book *Fanny Hill*); *Jacobellis*, *supra*, at 196 (reviews of French movie "Les Amants"); *United States v.*

One Book Called "Ulysses", 5 F.Supp. 182, 183 (S.D.N.Y. 1933), 72 F.2d 705, 706 (2nd Cir. 1934), (reputation and reviews of book *Ulysses*); *United States v. Levine*, 83 F.2d 156, 158 (2nd Cir. 1936) (L. Hand, J.) (reviews of several books); *Grove Press Inc. v. Christenberry*, 175 F.Supp. 488, 497-9 (S.D.N.Y. 1959) (reviews and reputation of book *Lady Chatterley's Lover*); *People v. Mature Enterprises, Inc.*, 343 N.Y.S.2d 911, 912-4, 917, 920-1 (1973) (reviews of movie "Deep Throat"); *Penthouse International, Ltd. v. McAuliffe*, 601 F.2d 1353, 1372 (5th Cir. 1980) (reputation of and awards received by *Penthouse* magazine). In most of these cases critical reception or reputation was adduced in support of a finding or opinion of non-obscenity but in several, e.g., *People v. Mature Enterprises*, *supra*, it was used to support a finding or opinion of obscenity. As petitioners argued below these reviews were admissible either as ordinary evidence, *United States v. Levine*, *supra*, especially in view of compliance with Fed. R. Evid. 803(24), or as judicially noticed legislative fact. *See Jenkins*, *supra*. The reviews are certainly probative of serious value—especially serious effect. Their almost unanimous condemnation and scathing tone demonstrate that "Caligula" has not had a serious effect.[15]

The effect or success of "Caligula" in respect to serious political value is a related question. As Dr. Reo Christenson, an eminent political scientist testified, "Caligula" does not communicate any serious political information. He said:

"I think that it also does not have serious political

[15] A typical review called the movie "a $17 million trough of rotten swill" and "abominable." The same review went on to say, "Movies . . . can't sink any lower than *Caligula*." Rex Reed, " 'Caligula,' the first 5-ychhh film," *New York Daily News*, February 6, 1980.

> value, because the movie itself is so full of scenes of sexual orgies and sexual debauchery, and so full of very vivid scenes of violence that the people who see the film are going to leave the film with those images in their minds. They are not going to leave with some kind of political message in their minds.

(T. 920). Thus, "Caligula" also fails to communicate any serious political message. This Court's independent review of serious value, *see Smith*, *supra*, at 305, will secure this point.

In summary, it is apparent with regard to serious artistic and political value that "Caligula" both lacks any serious purpose or intent and fails to have any serious effect. A correct application of the serious value test would have yielded these conclusions. For the same reasons mentioned earlier, the district court's failure properly to construe and apply the serious value test is a decision of an important federal question which deserves review. The district court's decision leaves obscenity laws impotent and of no meaning.

V. THE DISTRICT COURT'S IMPOSITION OF COSTS AGAINST PETITIONER McAULIFFE IN HIS INDIVIDUAL CAPACITY RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT.

The district court entered judgment and assessed costs against Petitioner McAuliffe both as Solicitor General of Fulton County and in his individual capacity. (R. 342, 345). Even if the district court's ruling is correct on the merits, to cast costs against petitioner McAuliffe in his individual capacity was legal error. According to all of the evidence, petitioner acted only in his official capacity. (T. 657). Moreover, as the Eleventh Circuit panel below

noted, McAuliffe unquestionably acted in good faith and with probable cause in stating that he would undertake prosecution of any persons who exhibited "Caligula" in his jurisdiction. 702 F.2d at 927-8.[16]

This is also an important federal question. To allow costs in these circumstances against a public official in his individual capacity is a frightening precedent. It can only chill and discourage the performance of governmental duties.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Eleventh Circuit.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant Attorney General

MARION O. GORDON
First Assistant Attorney General

DARYL A. ROBINSON
Senior Assistant Attorney General

GEORGE M. WEAVER
Assistant Attorney General

Please serve:

GEORGE M. WEAVER
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-2976

[16] Inasmuch as the trial was by a court sitting without a jury, no objection to this ruling need have been made below. Fed. R. Civ. P. 52.

APPENDIX

APPENDIX

PENTHOUSE INTERNATIONAL, LTD.,
Plaintiff-Appellee,

v.

Hinson McAULIFFE, Individually and as Solicitor General for the County of Fulton, State of Georgia, Defendant-Appellant.

No. 81-7426.

United States Court of Appeals,
Eleventh Circuit.

Oct. 17, 1983.

Appeal from the United States District Court for the Northern District of Georgia; Richard C. Freeman, Judge.

Before GODBOLD, Chief Judge, and RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

The court voted to consider this case en banc, which resulted in the panel opinion's being vacated. The judges of the en banc court, having heard oral argument and considered the case, are equally divided on the proper disposition. The judgment of the district court, 702 F.2d 925, is therefore AFFIRMED by operation of law, and this decision by the court of appeals has no precedential value. *Henderson v. Fort Worth Independent School District*, 584 F.2d 115 (5th Cir.1978) (en banc), *cert. denied* 441 U.S. 906, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979).

AFFIRMED BY OPERATION OF LAW.

PENTHOUSE INTERNATIONAL, LTD.,
Plaintiff-Appellee,

v.

Hinson McAULIFFE, Individually and as Solicitor General for the County of Fulton, State of Georgia, Defendant-Appellant.

No. 81-7426.

United States Court of Appeals,
Eleventh Circuit.

April 11, 1983.

Owner of rights to film brought suit to enjoin county prosecutor in Georgia from prosecuting or threatening to prosecute, under Georgia obscenity statute, any person exhibiting the film. The United States District Court for the Northern District of Georgia at Atlanta, Richard C. Freeman, J., denied permanent injunction but granted declaratory relief in favor of the plaintiff. On appeal by the county prosecutor, the Court of Appeals, Tjoflat, Circuit Judge, held that: (1) injunctive relief was properly denied where reasonable prosecutor could believe there was probable cause that those who would be involved in exhibition of the film would violate the Georgia obscenity statute as constitutionally applied, but (2) district court erred in proceeding to determination of the obscenity vel non of the film where such issue could not be resolved as matter of law.

Affirmed in part; reversed in part and remanded.

Lynne, District Judge, sitting by designation, dissented and filed opinion.

1. Injunction 105(1)

Where prosecutor threatened to enforce valid criminal statute against behavior that fell within ambit of statute, in that reasonable prosecutor could have believed there was probable cause that those who would be involved in exhibition of film would violate Georgia obscenity statute as constitutionally applied, such prosecutorial threat under such circumstances gave rise to no cause of action for injunction. O.C.G.A. § 16-12-80; U.S.C.A. Const.Amend. 1.

2. Constitutional Law 90.1(8)

Obscenity is not protected under the First Amendment, and states are free to enact statutes making exhibition of obscene matter criminal. O.C.G.A. § 16-12-80; U.S.C.A. Const.Amend. 1.

3. Criminal Law 31

It is fundamental that some innocent persons may be charged with violating criminal statutes, and, absent prosecutorial misconduct, no constitutional claim exists to relieve burden on those innocent persons of defending valid criminal prosecutions.

4. District and Prosecuting Attorneys 8

Prosecutor was well within his discretion in threatening to prosecute persons associated with showing of film, in that reasonable prosecutor could have believed there was probable cause that those involved in exhibition of such film would be violating Georgia obscenity statute as constitutionally applied. O.C.G.A. § 16-12-80; U.S.C.A. Const.Amend. 1.

5. Courts 508(7)

Though county prosecutor threatened to enforce valid criminal statute against behavior falling within ambit of statute, in sense that reasonable prosecutor could have believed there was probable cause that those who would be involved in exhibition of film would violate Georgia obscenity statute as constitutionally applied, owner of rights to film was not entitled to ruling from federal district court that film was not obscene unless it was proved that film was not obscene as matter of law regardless of factual context in which movie was shown. O.C.G.A. §§ 16-12-80, 16-12-80(b); U.S.C.A. Const.Amend. 1.

Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT and HENDERSON, Circuit Judges, and LYNNE*, District Judge.

TJOFLAT, Circuit Judge:

Penthouse brought this suit to enjoin the Solicitor General of Fulton County, Georgia, Hinson McAuliffe, from prosecuting or threatening to prosecute under the Georgia obscenity statute, Ga.Code § 16-12-80 (1980), any person who exhibited the movie "Caligula," the rights to which Penthouse owns.[1] Penthouse also sought a declaration that "Caligula" is not obscene within the meaning of that obscenity statute as constitutionally ap-

---

*Honorable Seybourn H. Lynne, U.S. District Judge for the Northern District of Alabama sitting by designation.

[1] Jurisdiction was predicated on 28 U.S.C. § 1343(3) (1976 & Supp. IV 1980), through which 42 U.S.C. § 1983 (1976) is implemented.

plied.[2] After a trial before the district court and an advisory jury, the court declared "Caligula" not obscene under state or federal law. The court denied Penthouse's prayer for a permanent injunction because it assumed that a declaratory judgment would have the same practical effect as an injunction of restraining prosecution or threats thereof. McAuliffe appeals from the district court's entry of declaratory relief in favor of Penthouse.

We affirm the district court's denial of the injunction, although our reasoning differs from that of the district court.[3] We reverse the district court's grant of Penthouse's prayer for declaratory relief and remand this claim because the court erred in proceeding to a determination of the obscenity vel non of "Caligula."

The essence of Penthouse's complaint is that McAuliffe is infringing on Penthouse's first amendment rights by threatening to prosecute persons involved in the showing

---

[2] Penthouse makes no attack on the facial validity of the Georgia obscenity statute. Indeed, such an attack would be frivolous because that statute explicitly incorporates the constitutional standards enunciated in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Ga.Code § 16-12-80 (1980).

[3] We recognize that Penthouse never cross-appealed the district court's denial of injunctive relief. Therefore, we discuss such denial at the risk of pontificating obiter dictum. We believe our discussion is necessary, however, for two reasons. First, our discussion of the district court's grant of declaratory relief would not be complete without a discussion of its denial of injunctive relief. Although the two prayers for relief are separate, they are closely related. A typical complaint, such as the one Penthouse brings, would contain both prayers. Neither should be considered in a vacuum; profitable comparison results from a discussion of both. Second, the district court denied injunctive relief solely because it thought declaratory relief would be sufficient. We now reverse the district court's grant of declaratory relief. Our reasons for agreeing with the district court that it should not have granted injunctive relief are so different from that of the lower court that we believe we are compelled to state them.

of "Caligula." [4] Penthouse alleges that it cannot obtain an exhibitor in Fulton County because of McAuliffe's threats of prosecution.[5] To remedy this infringement, Penthouse seeks two remedies: an injunction against prosecution or threats thereof, and a declaration that "Caligula" is not obscene. Careful analysis reveals that these two remedies are in fact based on separate causes of action.

[4] Penthouse's complaint describes the threat as follows:

Defendant McAuliffe's Conduct

16.

Defendant McAuliffe has publicly announced that he considers *Caligula* to be obscene by commencing a lawsuit in United States District Court for the Southern District of New York in the name and style: *Morality In Media, Inc., individually; and Morton A. Hill, S.J., for himself and all others similiarly* [sic] *situated; and Hinson McAuliffe, in his official capacity as Solicitor General of Fulton County, Georgia, himself and all others similiarly* [sic] *situated v. One Motion Picture Film Entitled "Caligula," a res; Edward R. Korman, in his official capacity as United States Attorney for the Eastern District of New York; and Benjamin R. Civiletti, in his official capacity as Attorney General of the United States*, Civil Action No. 80-0640 (hereinafter the "Southern District of New York Lawsuit"). Defendant McAuliffe, allegedly in his capacity as Solicitor General of Fulton County, Georgia, and as part of the Southern District of New York Lawsuit, caused to be issued by the Clerk of said court, a warrant for the seizure of *Caligula*.

17.

In the Southern District of New York Lawsuit initiated by Defendant McAuliffe and others, Defendant McAuliffe alleged under oath that *Caligula* is obscene; and Defendant McAuliffe alleged that if *Caligula* is exhibited in Fulton County, Georgia, Defendant McAuliffe will commit public funds and resources to institute prosecutions under Georgia law. Record, vol. 1, at 8-9. Penthouse's complaint also alleges that the plaintiffs in the Southern District of New York lawsuit, including McAuliffe, sought to compel the defendants therein to initiate some type of action to prevent the exhibition or distribution of "Caligula" in the United States. *Id.* at 9.

[5] We have no reason to question the district court's findings that McAuliffe has threatened to prosecute and that Penthouse cannot obtain an exhibitor in Fulton County.

[1] The focus of Penthouse's suit for an injunction is on McAuliffe's conduct. McAuliffe threatened to enforce a valid criminal statute against behavior that falls within the ambit of the statute, in the sense that a reasonable prosecutor could have believed there was probable cause that those who would be involved in the exhibition of "Caligula" would violate the Georgia obscenity statute as constitutionally applied. Prosecutorial threats in such circumstances give rise to no cause of action for an injunction.[6] To sustain a cause of action for an injunction, Penthouse would have to show some sort of "bad-faith" conduct on McAuliffe's part. We do not mean subjective bad-faith conduct; rather, if Penthouse could show that no probable cause reasonably could have existed to believe that those who would be involved in the exhibition of "Caligula" would be violating the Georgia obscenity statute as constitutionally applied, because "Caligula" is so clearly not obscene, the requisite objective bad faith would be shown.

[2, 3] We base this reasoning on several premises. Our initial and most basic premise is that obscenity is not pro-

[6] Indeed, the Supreme Court has, in dicta, addressed a similar, if not identical, situation. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). After holding an act creating a censorship commission unconstitutional, the Court stated:

> [W]e do not mean to suggest that private consultation between law enforcement officers and distributors prior to the institution of a judicial proceeding can never be constitutionally permissible. We do not hold that law enforcement officers must renounce all informal contacts with persons suspected of violating valid laws prohibiting obscenity. Where such consultation is genuinely undertaken with the purpose of aiding the distributor to comply with such laws and avoid prosecution under them, it need not retard the full enjoyment of First Amendment freedoms.

Id. at 71-72, 83 S.Ct. at 640. Thus, the Supreme Court has at least intimated that there may be no constitutional problem arising from threats of enforcement of a valid obscenity statute against conduct that falls within the reach of the statute.

tected under the first amendment. *See Miller v. California*, 413 U.S. 15, 23, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419 (1973). Thus, states such as Georgia are free to enact statutes making the exhibition of obscene matter criminal. *See* Ga.Code § 16-12-80 (1980). Our second premise is that states may enforce their valid criminal statutes within constitutional limits. They may also charge certain public officials, such as McAuliffe, with the responsibility of enforcing such laws. Our third premise is that it is fundamental that some innocent persons may be charged with violating criminal statutes, and that absent prosecutorial misconduct, no constitutional claim exists to relieve the burden on those innocent persons of defending valid criminal prosecutions. We believe the validity of these three premises is beyond question. We believe also that these premises lead inescapably to the conclusion that law enforcement officials must be allowed the discretion in good faith to do all that is reasonably necessary to their function of enforcing valid laws, and that the first amendment contemplates no other result.

[4] We hold that McAuliffe was well within his discretion in threatening to prosecute persons associated with the showing of "Caligula." Having viewed "Caligula," it is clear to us that a reasonable prosecutor could have believed there was probable cause that those who would be involved in the exhibition of "Caligula" in Fulton County, Georgia, would be violating the Georgia obscenity statute as constitutionally applied. Regardless of the obscenity vel non of the movie, it cannot be contended that the movie is so clearly not obscene that McAuliffe was acting in "bad faith" in threatening to prosecute. Without such a showing, we hold a claim for an injunction under the first amendment is not stated. Therefore, we affirm the district court's denial of Penthouse's prayer for injunctive relief.

[5] Penthouse's second claim seeks a declaratory judgment that "Caligula" is not obscene under the Georgia obscenity statute as constitutionally applied. We hold that Penthouse is entitled to this relief only if it can prove that "Caligula" is not obscene as a matter of law. If factual issues are present, Penthouse's claim must be denied because the claim would be nothing more than a request that a federal court determine whether prospective, possibly illegal conduct is in fact illegal under a valid state criminal statute. To allow such a claim would be to countenance the bypass of the entire state criminal justice system so a federal court could determine the "guilt or innocence," under a valid state criminal statute, of one who proposes to exhibit "Caligula." Notions of comity and federalism preclude us from recognizing such a cause of action, especially in an area in which local community standards are so crucial. *See Miller v. California*, 413 U.S. 15, 30-34, 96 S.Ct. 2607, 2618-20, 37 L.Ed.2d 419 (1973). In contrast, if Penthouse can prove that "Caligula" is not obscene as a matter of law, notions of comity and federalism would not interfere with a federal court's grant of declaratory relief. In granting relief, the federal court would not be invading the province of the state fact-finder; rather, it would be determining a question of federal constitutional law as a matter of law.

Furthermore, if Penthouse cannot prove that "Caligula" is not obscene as a matter of law, its claim must fail because it would not prove a present case or controversy. The allegedly protected conduct would be the prospective exhibition of a movie under hypothetical conditions. However, by addressing the claim only as a matter of law, no problem of the requisite case or controversy would exist because the complaint would be that the facts in-

volving the exhibition of the film, *e.g.*, where and when the movie is shown, are irrelevant. The complaint would be that regardless of the factual context in which the movie is shown, the movie is not obscene as a matter of law. Thus, there is nothing to prevent a federal court from recognizing such a cause of action.

We believe the above analysis is consistent with and supported by a case somewhat analagous to this one, *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). In *Steffel* the Supreme Court held that a valid claim for declaratory relief was stated when the complaint alleged threats of prosecution under a facially valid criminal prespass statute against conduct arguably protected under the first amendment. A cognizable claim was stated because a federal court could determine as a matter of law whether such threats violated the plaintiff's constitutional rights. No factual issues needed resolution; a pure question of law was presented. Because such a question was presented, no prohibitive problems of federalism or case or controversy arose.

Steffel would have been a much different case had it been disputed whether the plaintiffs would make a "knowing" entry upon the defendant's land within the meaning of the state trespass statute. Problems of federalism and case or controversy would have then arisen. The same problems arose in this case when the district court determined the obscenity vel non of "Caligula." The court had to determine the following hypothetical factual issues under the Georgia obscenity statute: whether the future showing of "Caligula" would predominantly appeal to the prurient interest of the local community; whether the showing would be patently offensive to that com-

munity; and whether the showing would have serious literary, artistic, political, or scientific value. *See* Ga.Code § 16-12-80(b) (1980). Only if these questions can be resolved as a matter of federal constitutional law [7] does this case parallel *Steffel*. If not, the district court must not attempt to resolve these questions because they are more appropriately left to state factfinders and because they involve hypothetical circumstances.[8]

AFFIRMED in part; REVERSED in part and REMANDED.

LYNNE, District Judge, dissenting:

In my opinion the discussion and affirmance of the district court's denial of an injunction are inappropriate. Penthouse did not contest that ruling by a cross-appeal. The superficial parallelism of the remedies of injunctive

[7] Because these questions must be resolved as a matter of law, a jury has no role in these determinations.

[8] We hold only that the district court cannot decide the question of the obscenity of "Caligula" as a matter of state law. We remand the case of the court to decide the question as a matter of federal constitutional law, just as a federal appellate court would if it was reviewing a state jury determination. *See Jenkins v. Georgia*, 418 U.S. 153, 161, 94 S.Ct. 2750, 2755, 41 L.Ed.2d 642 (1974) ("We hold that the film could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendments because it is obscene.") Thus, the dissent mischaracterizes our holding as one of abstention. We are not refusing to intervene to protect federal rights; we are refusing only to decide state law questions. We see no prohibition on deciding whether "Caligula" is protected as a matter of federal constitutional law without deciding any state law questions. The dissent also fails to recognize the separate nature of the state and federal questions. For example, the Georgia obscenity statute must give at least as much protection to "Caligula" as does the first amendment, but the statute may extend greater protection consistent with federal law. Furthermore, state law may vary depending on who applies it, i.e., a federal judge or a state jury. The state should be free to interpret its own law so long as that interpretation is consistent with federal constitutional law.

and declaratory relief would not seem to justify consideration of standards applicable to the former to illuminate the only issue before us, the grant of the latter.

I believe the court's opinion is contrary to the precise holding of *Steffel:*

> We therefore hold that, regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied. 415 U.S. 452, 475, 94 S.Ct. 1299, 1223-24, 39 L.Ed.2d 505 (1973).

It is conceded that Penthouse demonstrated a genuine threat of enforcement of the Georgia statute. Clearly there is a dispute as to whether this statute may be applied to "Caligula." McAuliffe believes "Caligula" is obscene; Penthouse does not. Thus there is a case or controversy within the meaning of Article III of the Constitution and the Federal Declaratory Judgment Act, 28 U.S.C. Sec. 2201. *Septum, Inc. v. Keller*, 614 F.2d 456 (5th Cir. 1980).

Synthesizing the averments of the complaint, the consolidated pre-trial order, the trial transcript, and the May 15, 1981 order of the court, it is at once apparent that the gravamen of the claim asserted by Penthouse is that "Caligula" is protected by the First Amendment as applied to the States through the Fourteenth Amendment. Concededly obscene material is not protected. *Miller* established a three-prong coterminous test to determine obscenity vel non which Georgia incorporated in its statute.

If "the average person, applying contemporary community standards would [not] find that ["Caligula"], taken as a whole, appeals to the prurient interest," the First Amendment insulates it from the application of the Georgia statute. Appeal to the prurient interest is a question of fact. *Smith v. United States*, 431 U.S. 291, 301, 97 S.Ct. 1756, 1763-64, 52 L.Ed.2d 324 (1977).

It would be anomalous to suggest that it is possible to adjudicate the question of whether material is obscene under the Georgia statute without resolving at the same time whether such material is protected by the First Amendment within the *Miller* definition of obscenity since out of the facts the law arises. Both the advisory jury and the court found as a fact that, applying contemporary community standards, Caligula does not appeal to the prurient interest.

A careful review of the Court's instructions to the jury reveals that its definition of the prurient interest was in accord with the teaching of *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). The Court properly charged the jury that the burden of proof with respect to obscenity was proof beyond a reasonable doubt. *McKinney v. Alabama*, 424 U.S. 669, 684, 96 S.Ct. 1189, 1197, 47 L.Ed.2d 387 (1976) (Brennan, J., concurring in the judgment). It is reasonable to assume that the trial judge applied these standards in his own fact findings.

Finally, I cannot agree with the implication of the Court's opinion that the district court was powerless to resolve the question of whether Caligula is obscene under the Georgia statute in order to reach the question as to whether it is protected by the First Amendment; that it is "more appropriately left to state factfinders."

Septum, Inc. squarely holds that under the circumstances of this case abstention is inappropriate. Presumably state factfinders would be confined to a criminal proceeding. The fallacy of this approach is demonstrated by the reasoning of *Steffel:*

> [W]hile a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state prosecution is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.

415 U.S. at 462, 94 S.Ct. at 1217.

I respectfully dissent.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PENTHOUSE INTERNATIONAL, LTD. vs. HINSON McAULIFFE, Individually and as Solicitor General for the County of Fulton, State of Georgia	CIVIL ACTION NO. 80-2172A

ORDER

This action for declaratory and injunctive relief is brought under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution. Plaintiff, Penthouse International, Ltd. (Penthouse) is the owner of the film *Caligula* and the rights to distribute the film in the United States. Penthouse wishes to distribute *Caligula* for exhibition in Atlanta, Georgia. Defendant Hinson McAuliffe is the Solicitor General of Fulton County, which includes the city of Atlanta, and is authorized to enforce the Georgia criminal obscenity statute, Ga. Code § 26-2101. Penthouse seeks a declaratory judgment that *Caligula* is not obscene under Ga. Code § 26-2101 and the First Amenement, and an order enjoining defendant McAuliffe from arresting or prosecuting any persons connected with the film's distribution or exhibition. McAuliffe has asserted a counterclaim seeking a declaration that the film is obscene under state and federal standards.

We note at the outset that the issues raised in this action are properly before this court under the standards

set out in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. There is no state criminal or civil proceeding pending against plaintiff. *See Steffel v. Thompson*, 415 U.S. 452 (1974). In addition, plaintiff's standing has not been challenged. Solicitor McAuliffe made it abundantly clear both before Penthouse filed this action and at trial that he would attempt to institute criminal proceedings against plaintiff if it should undertake to distribute or exhibit *Caligula* in Fulton County, Georgia. A representative of a local theater also stated that he would exhibit the film but for fear of prosecution. The jurisdiction of this court is predicated on 28 U.S.C. §§ 1331, 1343.

The action came before the court for trial on April 13-22, 1981. To aid the court in its application of "contemporary community standards" as required by *Miller v. California*, 413 U.S. 15, 24 (1973), the court in its discretion impaneled an advisory jury at trial pursuant to Rule 39(c), Fed. R. Civ. P. The following order shall serve as the court's findings of fact and conclusions of law, Rule 52(a), Fed. R. Civ. P.

I. THE LEGAL STANDARDS

The Supreme Court established a three-pronged test in *Miller v. California* governing the determination of obscenity under either state or federal legislation. The factfinder must examine:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest. . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24. The Georgia criminal obscenity statute substantially tracks the constitutional test and defines with specificity the types of sexual conduct that may fall under the second criterion of the *Miller* formula.[1] Ga. Code § 26-2101.

---

[1] Ga. Code § 26-2101 provides:

(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing," as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. Provided, however, the character and reputation of the individual charged with an offense under this law, and if a commercial dissemination of obscene material is involved, the character and reputation of the business establishment involved may be placed in evidence by the defendant on the question of intent to violate this law. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(b) Material is obscene if:

(1) to the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is a shameful or morbid interest in nudity, sex or excretion;

(2) the material taken as a whole, lacks serious literary, artistic, political or scientific value, and

(3) the material depicts or describes, in a patently offensive way, sexual conduct specifically defined in subparagraphs (i) through (v) below:

(i) acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

(ii) Acts of masturbation;

(iii) acts involving excretory functions or lewd exhibition of the genitals;

(iv) acts of bestiality or the fondling of sex organs of animals;

(v) sexual acts of flagellation, torture or other violence indicating a sadomasochistic sexual relationship;

The first and second prongs of the *Miller* guidelines require the factfinder to apply contemporary community standards to the factual determination of the work's "prurient appeal" and "patent offensiveness." *Smith v. United States*, 431 U.S. 291, 300-01 (1977). In addition, "obscenity is to be judged according to the average person in the community, rather than the most prudish or most tolerant." *Id.* at 304. The factfinder, whether judge or jury, may draw on its own knowledge of the community, aided by expert testimony in certain instances, when making its determinations.

On the other hand, the third prong of the test, whether the material "taken as a whole, lacks serious literary, artistic, political, or scientific value," *Miller v. California*, 413 U.S. at 24, is intended as a check on the first two elements of the test. *See Jenkins v. Georgia*, 418 U.S. 153, 164 (1974) (Brennan, Stewart, Marshall, JJ., concurring). The judicial role is more pronounced in the determination of the "serious value" of the material, which is not to be judged by the tastes of the "average person" or measured by "community standards." *See Smith v. United States*,

---

(c) Additionally, any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section.

(d) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(e) It is an affirmative defense under this section that dissemination of the material was restricted to:

(1) a person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to such material; or

(2) a person whose receipt of such material was authorized in writing by a licensed medical practioner or psychiatrist.

A person convicted of distributing obscene material shall be punished as for a misdemeanor of a high and aggravated nature.

431 U.S. at 301. Each and every element of the *Miller* test must be met, however, before a work can be adjudicated obscene.

II. THE OBSCENITY VEL NON OF CALIGULA

Robert Guccione, editor of *Penthouse* magazine and president and chairman of Penthouse International, Ltd., the producer of *Caligula*, has allegedly recreated in the film the life of the Roman Emperor Caligula during his reign from 37 A.D. to 41 A.D. and the condition of Roman society at that period in history. Based on the biography of Caligula in *The Twelve Caesars* by the ancient historian Suetonius, the movie is purportedly adapted from a screenplay by Gore Vidal and stars Malcolm McDowell, Peter O'Toole, Sir John Gielgud, Teresa Anne Savoy, and Helen Mirren. To date, the film has been exhibited in over one hundred cities in the United States and in a number of foreign countries.

Mr. Guccione could have made an interesting movie of Caligula's life and times, but he chose not to. For approximately two and one-half hours, the movie depicts with vivid explicitness the decadence and corruption that characterized imperial Rome. Mr. Guccione leaves little to the viewer's imagination in the depictions of the sexual promiscuity and violence that allegedly abounded in the Emperor's household, court, and in Roman society at large. Opening with scenes suggesting Caligula's incestuous relationship with his sister, Drusilla, the film quickly progresses to the island grotto of the Roman Emperior Tiberius, Caligula's grandfather, where sexual acts and aberrations of all types are graphically depicted. From thence forward, the film is a dizzying display of bodies, genitals, orgies, heterosexual and homosexual activity, masturbation, bodily functions, and sexual con-

duct and excesses of all varieties.

Sexual conduct is not all that is revealed, however. Violence is as much a part of the corrupt Roman society portrayed in this film as is promiscuity.[2] From the assumption of power by Caligula to his final assassination by the Praetorian guards, the film is awash with blood and gore. As soon as Caligula takes the ring symbolizing imperial authority from the hand of the dying Tiberius, he is transformed into a brutal monster with a depraved indifference to human life. There are scenes of cruel and violent acts *ad nauseum*, including disembowelment, castration, decapitation, rape, and murder.

This cinematic portrayal of sex and violence, Penthouse asserts, has a serious, although not an original, message. Borrowing from Lord Acton, Penthouse contends that the film *Caligula* conveys the moral that "power corrupts and absolute power corrupts absolutely." Fearing perhaps that the viewer might miss this message in *Caligula* as originally filmed by Italian director Tinto Brass, Mr. Guccione allegedly took the finished film and spliced in several additional scenes of explicitly sexual acts. Whether due to Mr. Guccione's artistic tampering with the movie or due to some other displeasure with the final product, Gore Vidal, Malcolm McDowell, Peter O'Toole, Sir John Gielgud, and others involved in the production have purportedly disassociated themselves from the film.

---

[2] "Obscenity" which can be regulated by the states includes only sexual, not violent, material. *Miller v. California*, 413 U.S. at 24. "Material containing violence, brutality or cruelty cannot be considered obscene unless it also contains depictions or descriptions of of sexual conduct." *Sovereign News Co. v. Falke*, 448 F. Supp. 306, 394 (N.D. Ohio 1977), *remanded*, 610 F.2d 428 (6th Cir. 1979), *cert. denied*, 447 U.S. 923 (1980).

Solicitor McAuliffe is firmly convinced that *Caligula* meets all three prongs of the *Miller* test, and is obscene within the meaning of the Georgia criminal code. Even before he had seen the film, McAuliffe brought an unsuccessful lawsuit in the Southern District of New York seeking the confiscation of the film, which was imported from abroad. Solicitor McAuliffe has threatened to institute criminal proceedings against any exhibitor in Fulton County who attempts to show *Caligula*.

If bad taste could be adjudicated "obscene" under the First Amendment, the task for this court would be greatly simplified. Few chores more distasteful than being a captive audience for Mr. Guccione's products have been thrust upon this court.[3] But vulgarity and offensiveness alone are not sufficient grounds for censorship under the prevailing law of obscenity. After viewing the film and listening to almost two weeks of testimony, the advisory jury impaneled for these proceedings determined that the film *Caligula* is not obscene under Ga. Code § 26-2101 and the *Miller* guidelines.[4] Specifically, the jury found that the film meets the applicable standards of patent offensiveness and that it lacks serious literary, artistic, political, or scientific value, but that the movie, taken as a whole, does not appeal to the prurient interest. For the reasons that follow, this court also concludes that *Caligula* is not obscene under federal or state law.

---

[3] *See, e.g., Penthouse International, Ltd. v. McAuliffe*, 454 F. Supp. 289 (N.D. Ga. 1978) (Freeman, J.); *Penthouse International, Ltd. v. McAuliffe*, 436 F. Supp. 1241 (N.D. Ga. 1977) (Freeman, J.), *rev'd in part*, 610 F.2d 1353 (5th Cir. 1980).

[4] The jury was instructed to apply the "beyond a reasonable doubt" standard of proof. *See McKinney v. Alabama*, 424 U.S. 669, 684-87 (Brennan, J., concurring).

A. **Prurient Appeal**

As the Supreme Court has pointed out, "sex and obscenity are not synonymous." *Roth v. United States*, 354 U.S. 476, 487 (1957). "Obscene material is material which deals with sex in a manner appealing to the prurient interest." *Id.* In its traditional meaning, obscenity may include that which is " '[o]ffensive to the senses, or to taste or refinement, disgusting, repulsive, filthy, foul, abominable, loathsome.' " *Miller v. California*, 413 U.S. at 18 n.2. But such material is not obscene, however, and hence not subject to state regulation unless it deals with sex in a way which appeals to the prurient interest. Thus, the first component of the tripartite *Miller* test is "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest." *Id.* at 24.

Although the Supreme Court set forth several definitions of "prurient interest" in *Roth v. United States*, 354 U.S. at 487 n.20, which are incorporated in the *Miller* formula, it quoted with approval the language used in the draft of the A.L.I. Model Penal Code.

> A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . .

See Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353, 1363 (5th Cir.), *cert. dismissed*, 447 U.S. 931 (1980). To appeal to the "prurient interest," the material must have " 'a tendency to excite lustful thoughts,' " or sexually stimulate the view or reader. *Roth v. United States*, 354 U.S. at 487 n.20. As one leading commentator on the law of obscenity has stated, if the aim of the work "is to produce psychic or physical stimulation, on a less than

intellectual plane, and on a short-term basis, then the prurient interest aspect of the test for obscenity has been met." F. Schauer, *The Law of Obscenity* 102 (1976).

For the "prurient interest" test to be satisfied, the dominant theme of the material, taken as a whole, must appeal to the prurient interest.[5] Even if an individual scene or scenes may create some sort of immediate erotic stimulation in the viewer, that is insufficient to meet the test. The prurient appeal must be a predominant theme in the work. Just as "[a] quotation from Voltaire on the flyleaf of a book will not redeem an otherwise obscene publication . . . ," *Kois v. Wisconsin*, 408 U.S. 229, 232 (1972), isolated scenes of sexual conduct, even if prurient, will not necessarily satisfy the first prong of the *Miller* test. When considering the material as a whole, the factfinder must decide whether the average person, applying contemporary community standards, would conclude that the work predominantly appeals to the prurient interest, or to a shameful or morbid interest in sex.

It is not disputed that *Caligula* contains a sexual theme and continuous depictions of sexual conduct. But prurient appeal is not the equivalent of sexual explicitness. Dr. Downing Tait, Jr., a practicing psychiatrist in the local area with impressive academic credentials, testified for Penthouse on the issue of prurient interest. In his opinion, to the average person in Fulton County, the overwhelming depictions of violence, cruelty, and sexual explicitness in *Caligula* would not arouse erotic interest. The doctor testified that the natural rhythm of sexual

---

[5] In *Miller v. California*, 413 U.S. at 24, the Supreme Court does not specifically use the phrase "dominant theme" or "predominant appeal" as used in *Roth v. United States*, 354 U.S. at 487 n.20, but the "taken as a whole" language in *Miller* carries the same meaning. *See* Schauer at 105. *See also* Ga. Code § 26-2101(b)(1).

arousal is, in fact, obstructed by the fast-paced explicitly sexual depictions.

Similarly, Dr. Wardell B. Pomeroy, sex therapist and co-author of the Kinsey Reports among other accomplishments, also testified as to the prurient appeal of *Caligula*. In his view, the film does not predominantly appeal to the prurient interest because there is no erotic build up or crescendo. The doctor stated that he had seen films which appealed to the prurient interest in sex, but that *Caligula* did not. Although unfamiliar with Fulton County standards, Dr. Pomeroy testified that the average person would likely find the film revolting and offensive, but lacking in stimulative effect.

Dr. Fred Crawford, a professor of sociology at Emory University, and Dr. James Mallory, a psychiatrist practicing in Atlanta primarily in the area of family counseling and the applicability of Christian principles to mental health problems, testified for defendant McAuliffe on the issue of prurient appeal. Dr. Crawford stated that the average person in Fulton County would be shocked or repulsed by the film, which he believes appeals to a shameful or morbid interest in sex. Dr. Mallory also testified that the predominant appeal of the movie would shock or disgust most people in Fulton County, and therefore the average person would find that it appeals to a prurient interest in sex.

Neither of defendant's witnesses were particularly credible either on the issue of community standards or on the issue of prurient interest. Dr. Crawford is a sociologist with little expertise or experience in human sexuality.[6]

[6] Dr. Crawford has taken and taught courses on human sexuality public polling, and film. His doctoral dissertation was on the subject of the impact of tornado disasters on families.

Dr. Mallory's practice is also not focused on sexuality, and his contact with Fulton County residents is limited almost entirely to white clients seeking family counseling services, or those who attend his lectures to civic and church groups. In addition, Dr. Mallory and Dr. Crawford agreed with the plaintiff's witnesses that the effect of the film was shocking, not stimulating.

The concept of prurient appeal has never been adequately defined by the Supreme Court. It is clear from the cases, however, that the presence of shocking, disgusting, or explicitly sexual scenes in a movie is insufficient to satisfy the "prurient interest" test of *Miller*. Except for a prolonged and explicit lesbian love scene, and a protracted depiction of fellatio, the images of sexual conduct in *Caligula* are largely kaleidoscopic. While *Caligula*, taken as a whole, certainly does not appeal to a healthy or normal interest in sex, neither does it appeal to a prurient interest in sex. The tendency of *Caligula* instead is to inhibit sexual stimulation. This court finds, as did the advisory jury, that to the average person applying contemporary community standards, the film *Caligula*, viewed in its entirety, does not appeal to the prurient interest in sex.

B. **Patent Offensiveness**

Although *Caligula* does not contain explicit scenes of every act proscribed by the Georgia Code, it very nearly covers the gamut of prohibited depictions. That the depictions are also "patently offensive" and go "substantially beyond customary limits of candor," *Roth v. United States*, 354 U.S. at 487 n.20, is conceded by Penthouse. Except for some disputed evidence as to the proper definition of "sadomasochistic relationship," Penthouse made no attempt to convince the court or the jury that the film

either did not describe conduct enumerated in the Georgia law or that it did not depict the conduct in a patently offensive manner.

The jury representing the community's views in these proceedings determined that the sexual depictions in *Caligula* are an affront to contemporary community standards. In this court's view, the depictions of sexual conduct in *Caligula* exceed the customary limits of society's tolerance, and are "patently offensive" under state law and the second prong of the *Miller* test.

C. **Serious Value**

The third prong of the *Miller* test requires the fact-finder to determine "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 24. Because the *Miller* test is conjunctive, and we have already determined that *Caligula* fails to satisfy the "prurient interest" element, we need not address the issue of serious value. Even if the film lacks serious literary, artistic, political or scientific value, it cannot be found obscene. Nevertheless, as there was considerable testimony on this issue at trial, we will briefly review our findings.

Penthouse contends that *Caligula* is, on the whole, a historically accurate portrayal of the depraved life and times of the Emperor Caligula, and that it conveys an important political message by showing the utter corruption that accompanies unbridled power. Penthouse also argues that the film contains serious artistic merit in its acting, cinematography, costuming and set design, use of music, and screenplay. Solicitor McAuliffe argues that the depiction of Caligula's life is merely a vehicle chosen by Penthouse for producing a hard-core pornographic film.

In *Miller v. California*, the Supreme Court expressly rejected the "utterly without redeeming social value" test

of *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), in favor of the "serious value" formulation. Unfortunately, there is little case law enlarging or defining the meaning of the phrase "serious value." It is clear, however, that "serious value" is not to be judged by the tastes of the "average person" or measured in terms of "community standards." *Miller v. California*, 413 U.S. at 30; *Smith v. United States*, 431 U.S. at 301. This court must rely on the opinions of expert witnesses as to the "serious value" of the specific material in question, while keeping in mind the Supreme Court's directive that "the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression." *Miller v. California*, 413 U.S. at 23.

No doubt, there have been and will be viewers of the film *Caligula* who find it entertaining. The film also has a plot. It begins with Caligula's rise to power, progresses through his reign as Emperor, and ends with his well-deserved assassination. Further, the film conveys to the viewer at least one idea: Caligula and the Romans were depraved and decadent. None of these characteristics of *Caligula* would be enough, however, whether standing alone or taken together, to endow the film with "serious value." Mere entertainment value, the existence of a tenuous story or plot line, or the inclusion of an isolated idea are usually insufficient to redeem an otherwise obscene work. *See, e.g., Kaplan v. California*, 413 U.S. 115 (1973); *United States v. Gundlach*, 345 F. Supp. 709 (M.D. Pa. 1972); *United States v. New Orleans Book Mart, Inc.*, 328 F. Supp. 136 (E.D. La. 1971).

At the least, we believe that by the phrase "serious value" the Supreme Court meant to extend constitutional protection to material which advocates ideas and in which

the ideas are not used merely as a disguise or sham for presenting obscenity. The ideas must be a substantial part of the material and treated in a non-frivolous manner. *See* Schauer at 137-53. Serious themes inserted merely as a pretext to try to dignify or insulate obscene material will not entitle a film or any other work to constitutional protection.

In presenting its case, Penthouse neither claimed nor attempted to show that *Caligula* has serious scientific or literary value. Only one witness, Dr. Samuel Schoenbaum, a professor of Renaissance literature at the University of Maryland, peripherally touched on the literary merit of the screenplay. Plaintiff limited its evidence to testimony on the film's artistic and political value. Defendant offered several witnesses, however, who testified as to the lack of any serious scientific value in the film. This court cannot conclude from seeing the film and hearing the testimony presented that *Caligula* has serious scientific or literary value.

Caligula is, however, substantially more than a mere masquerade for pornography. Although the film falls far short of being a work of art or an important political statement, it does possess, in some significant amount, artistic matter and political themes. We do not believe that the "serious value" test of *Miller* was meant to extend constitutional protection only to works which are artistic successes or works which include textual political commentary. All political views and ideas, including historical narrative and social criticism, are protected, as are all serious artistic and intellectual efforts, whether they appeal to the average person or not. Weighing all of the factors evident in the film itself with the expert testimony presented at trial, we conclude that the film has

both serious artistic and political value.

One of the plaintiff's most convincing witnesses on the issue of artistic value was Dr. Robert Sklar, professor and chairman of the department of cinema studies at New York University, and author of many publications on film history, theory, and criticism. His definition of "serious artistic value" in regard to film is evidence of an attempt to communicate ideas, moods, and emotion through the different elements of film. Many films which are artistic failures and receive bad reviews nevertheless have serious artistic value. Although Dr. Sklar assessed *Caligula* as an artistic failure with many flaws, he found serious artistic value in the way the film communicated the themes of corruptive power, indifference to human life, terror, the relationship of mortality and immortality, and the apposition of genuine love versus depraved, abusive, and selfish gratification. Dr. Sklar testified that the movie conveyed these ideas and emotions through the effective use of acting, set design, cinematography, music, and the other elements of the cinematic art.

The defendant's witnesses on the issue of artistic value took a much more limited view of the meaning of that phrase. To Monsignor Clark, who is currently pastor of a church in Crestwood, New York, and was formerly a media liaison with the Catholic archdiocese of New York, "art" implies perfection in form, and a work has "serious artistic value" when there is something "beautiful" or "pleasing" about it. To Dr. James Fletcher, a teacher in journalism and mass communication at the University of Georgia, who has published in the area of mass communication, "serious artistic value" has a broader definition. A film drama, such as *Caligula*, has artistic value when it has "synthetic effect" and manifests "both unity and

integrity with respect to advancing a theme." In Dr. Fletcher's view, the execution of sets, costumes and make-up in *Caligula* are unartistic. The graphic portrayals of sex and violence detract from any artistic integrity and violate the principle of aesthetic distance by overinvolving the audience in physical details. In addition, Dr. Fletcher found that the movie does not have serious artistic value as a melodrama becuase the themes are not successfully carried out in the plot. Although Dr. Fletcher has taken several film courses, his expertise is in the area of audience response to mass media. He has never studied film aesthetics or criticism, and has not seen such major motion pictures as *The Deer Hunter*, *Cries and Whispers*, *Apocalypse Now*, *Klute*, *Coming Home*, *Shampoo*, or *Scenes from a Marriage*.

Although, in this court's view, the production of *Caligula* is a resounding artistic failure, we also find Professor Sklar's interpretation of artistic value particularly persuasive. "Serious artistic value" is an elusive concept and a difficult determination for a layperson, whether judge or jury, to make. Art is obviously more than what is pretty or pleasing to the eye, and it encompasses more than what is successful or popular. Evidence of originality or creativity is what distinguishes art from craft, and "serious artistic value" implies the presence of originality and artistic effort in some substantial amount. Although there are many offensive and unnecessary scenes in *Caligula* which detract from its artistic value, the artistic effort and creativity that went into the acting and the filming of the movie are evident. Taken as a whole, we conclude that *Caligula* has serious artistic value.

Both parties also called a parade of witnesses testifying to the political value, or lack thereof, of *Caligula*.

Assertedly based on Suetonius's biography of Caligula in *The Twelve Caesars*, Penthouse contends the film is an accurate historical depiction of the depravity of pagan Rome, and it teaches the lesson that absolute power corrupts absolutely. Mr. McAuliffe argues that the film is historically inaccurate and its political value trivial. Any political or historical message is lost in the images of sex and violence.

There was much testimony at trial on the issue of the historical accuracy and completeness of *Caligula*. While we are persuaded that, for the most part, the types of events and grotesque behavior portrayed in the film are historically factual, historical accuracies or discrepancies are largely irrelevant to whether the movie has serious political value.[7] Although historical accuracy may add

---

[7] By "political value," the Supreme Court did not mean to extend constitutional protection only to works which advocate political ideas or opinions, that is, to ideas relating strictly to government. Ideas relating to social issues and institutions are equally protected. *See, e.g., Kois v. Wisconsin*, 408 U.S. at 230:

> 'The freedom of speech and of the press guaranteed by the Constitutional embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for *information and education with respect to the significant issues of the time. . . .*'

(emphasis in original), *quoting Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940). *See also Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 688-89 (1959):

> It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax.

to the purported political or educational value of a work, mere historical meticulousness will not rescue an otherwise obscene work from censorship. On the other hand, a purely fictional account may have political value if it advocates an idea or expresses an opinion. As the Supreme Court stated in *Kois v. Wisconsin*, 408 U.S. at 231, "[a] reviewing court must, of necessity, look at the context of the material, as well as its content." The inquiry for this court, then, is first, whether *Caligula* has political content, and second, whether in the context of the work taken as a whole, that material is treated in a serious manner.

Caligula clearly contains political, historical, and social themes and subthemes, including the use and abuse of power, dynastic and institutional struggle, the violence and corruption that attends a society bankrupt in moral values, and the fragility of civilization as we know it. In addition, in the context of the film, these themes provide more than a mere vehicle for sexual explicitness. Although the sexual content in *Caligula* is excessive, it is not unrelated to the social and political themes. That *Caligula* could have more eloquently and convincingly conveyed its ideas does not negate its serious political value. We cannot say that the film, taken as a whole, lacks serious political value.

In summary, we conclude: (1) that the film *Caligula*, taken as a whole, does not appeal to the prurient interest in sex; (2) that the film depicts, in a patently offensive way, conduct specifically defined by Ga. Code § 26-2101, and (3) that the film, taken as a whole, lacks serious literary and scientific value, but contains serious artistic and political value.

III. RELIEF

Having found that *Caligula* is not obscene under *Miller v. California*, 413 U.S. 15, and Ga. Code § 26-2101, we will grant the declaratory relief plaintiff requests. Plaintiff also seeks, however, an injunction against defendant arresting, prosecuting, or initiating criminal proceedings against any persons who may distribute or exhibit the film *Caligula* in Fulton County, Georgia. In *Samuels v. Mackell*, 401 U.S. 66, 72 (1971), the Supreme Court stated that "declaratory relief alone has virtually the same practical impact as a formal injunction would." Although plaintiff has shown the threat of prosecution, courts usually assume that law enforcement officers will honor a declaratory judgment. We will deny plaintiff's claim for injunctive relief.

Accordingly, it is hereby DECLARED that the film *Caligula* is not obscene under federal or state law. Plaintiff's claim for injunctive relief is DENIED. Defendant's counterclaim for declaratory relief is DENIED. The Clerk of the Court shall enter FINAL JUDGMENT in favor of plaintiff in this action.

IT IS SO ORDERED.

This, the 15th day of May, 1981.

/s/ RICHARD C. FREEMAN

RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

United States Code, Title 28:

§ 1331. **Federal question**

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

§ 1343. **Civil rights and elective franchise**

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

* * *

§ 2201. **Creation of remedy**

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and

effect of a final judgment or decree and shall be reviewable as such.

§ 2202. **Further relief**

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

United States Code, Title 42:

§ 1983. **Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Official Code of Georgia Annotated, Title 16:

§ 16-12-80 (formerly Ga. Code Ann. § 26-2101).

Distributing obscene materials

(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits, or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing," as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has

constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material; provided, however, that the character and reputation of the individual charged with an offense under this law, and, if a commercial dissemination of obscene material is involved, the character and reputation of the business establishment involved may be placed in evidence by the defendant on the question of intent to violate this law. Undeveloped photographs, molds, printing plates, and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(b) Material is obscene if:

(1) To the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion;

(2) The material taken as a whole lacks serious literary, artistic, political, or scientific value; and

(3) The material depicts or describes, in a patently offensive way, sexual conduct specifically defined in subparagraphs (A) through (E) below:

(A) Acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

(B) Acts of masturbation;

(C) Acts involving excretory functions or lewd exhibition of the genitals;

(D) Acts of bestiality or the fondling of sex organs of animals; or

(E) Sexual acts of flagellation, torture, or other violence indicating a sadomasochistic sexual relationship;

(c) Additionally, any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this Code section.

(d) Material not otherwise obscene may be obscene under this Code section if the distribution thereof, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(e) It is an affirmative defense under this Code section that dissemination of the material was restricted to:

(1) A person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to such material; or

(2) A person whose receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist.

(f) A person who commits the offense of distributing obscene material shall be guilty of a misdemeanor of a high and aggravated nature.

Official Code of Georgia Annotated, Title 24:

§ 24-4-3. **Amount of mental conviction required; preponderance of evidence in civil cases**

Moral and reasonable certainty is all that can be expected in legal investigation. In all civil cases a preponderance of evidence is considered sufficient to produce mental conviction. . . .

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 1984, three copies of the foregoing petition for writ of certiorari were mailed, postage prepaid, to:

James L. Paul, Esq.
3900 First Atlanta Tower
Atlanta, Georgia 30383

Norman Roy Grutman, Esq.
505 Park Avenue
New York, New York 10022

I further certify that service is not required on any other persons. Rule 28.

GEORGE M. WEAVER

Office - Supreme Court, U.S.
FILED
FEB 15 1984
ALEXANDER L. STEVAS,
CLERK

Case No. 83-1160

IN THE

Supreme Court of the United States

October Term, 1983

HINSON McAULIFFE, Individually; and
JAMES L. WEBB, as Solicitor General for the
County of Fulton, State of Georgia,
Petitioners,

v.

PENTHOUSE INTERNATIONAL, LTD.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

NORMAN ROY GRUTMAN
RICHARD E. HAHN
Grutman, Miller,
Greenspoon & Hendler
505 Park Avenue
New York, New York 10022
(212) 888-1900

JAMES L. PAUL
KATHARINE C. ROBEY
Gambrell & Stolz
3900 First Atlanta Tower
Atlanta, Georgia 30383
(404) 658-9150

Counsel for Respondent

QUESTIONS PRESENTED

Respondent objects to numbers one through four of the Questions Presented (Pet., p. i) to the extent these questions state that the issue below and in this Court pertains to the obscenity of the movie, *Caligula*, under state law. The question litigated below was whether Petitioner McAuliffe's threatened arrests under O.C.G.A. § 16-12-80 for exhibition of *Caligula* would constitute an infringement of First and Fourteenth Amendment rights. The Petitioner's statement of Questions Presented is an attempt to focus the issues in a way which is contrary to the record in this case.

PARTIES OF THE PROCEEDING

In addition to those parties listed in the caption to the case, respondent here lists pursuant to Sup. Ct. R. 28.1, all parent companies, subsidiaries and affiliates of Penthouse International, Ltd.:

Boardwalk Properties, Inc.
Bravo International, Ltd.
Dial-A-Delight, Inc.
Evelyn Rainbird, Ltd.
Evelyn Rainbird House Parties, Inc.
F D X Patent Holding Company, N.V.
Film Follies, Inc.
Follycons, Inc.
For Your Ears Only, Ltd.
Forum International, Inc.
Forum International, Ltd.
Minaotaur Press, Ltd.
Nova Publications, Ltd.
Omni Accessories, Inc.
Omni Export Corporation
Omni Medical Services Corp.
Omni New Frontier Productions, Ltd.
Omni Productions International, Ltd.
Omni Publications International, Ltd.
P-H Construction Corp.
P-H Fine Arts, Ltd.
P.H. Realty Leasing Corp.
Pan Am Pharmaceutical Associates, Ltd.
Penthouse Atlantic Corporation
Penthouse Book Society, Ltd.
Penthouse Clubs, Ltd.
Penthouse Clubs International, Ltd.
Penthouse Clubs International Establishment

Penthouse Communications, Ltd.
Penthouse Creations, Ltd.
Penthouse Energy Technology Systems, Ltd.
Penthouse Export Corporation
Penthouse Films International, Ltd.
Penthouse Financial Services, N.V.
Penthouse International, Ltd.
Penthouse International of California, Ltd.
Penthouse Letters, Ltd.
Penthouse - Lincoln Associates, Ltd.
Penthouse Maintenance & Security Co., Ltd.
Penthouse Music, Ltd.
Penthouse Photo World, Ltd.
Penthouse Poster Press, Ltd.
Penthouse Press, Ltd.
Penthouse Products, Inc.
Penthouse Products, Ltd.
Penthouse Properties, Ltd.
Penthouse Property Development, Ltd.
Penthouse Publications, Ltd.
Penthouse Records, Ltd.
POF Subsidiary Co., Ltd.
Rotel, Inc.
Tilley Marlieb Advertising, Inc.
Tilley Marlieb Productions, Inc.
2201 Boardwalk, Inc.
U.S. Robots & Mechanical Men, Inc.
Variations Publishing International, Ltd.
Viva International, Ltd.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties To The Proceeding	ii
Table Of Authorities	vi
Jurisdiction	2
Statutory Provisions Involved	2
Statement Of The Case	2
Summary Of Arguments Presented	6
Reasons The Petition Should Be Denied	9
I. The District Court's Exercise Of Jurisdiction Does Not Constitute A Basis For Certiorari Jurisdiction	9
A. The Requirements Of Sup. Ct. R. 17.1 Have Not Been Met	9
B. The District Court's Exercise Of Jurisdiction Under 28 U.S.C. §2201 Does Not Raise Any Important Question Of Federal Law, And Does Not Conflict With Applicable Decisions Of This Court	10
II. Even Assuming The District Court Used The Reasonable Doubt Standard Of Proof, And That This Was Error, This Is Not A Basis For Granting Certiorari	14
A. The Record Is Unclear As To Whether The District Court Utilized The Reasonable Doubt Standard	14
B. Legal Error Is Not A Basis For Issuance Of A Writ	15

TABLE OF CONTENTS (Continued)

Page

C. The Standard Of Proof Utilized Does Not Conflict With Any Decisons Of This Court 15

III. The District Court's Interpretation Of Prurient Interest As Applied In Its Fact Findings Cannot Be The Basis For Granting Certiorari 16

IV. The District Court's Finding That *Caligula* Has Serious Value Cannot Be The Subject Of Certiorari Jurisdiction 19

A. The District Court's Construction And Application Of The Serious Value Test Does Not Conflict With Applicable Decisions Of This Court And Is Not Of Great Importance 19

B. Certiorari Should Not Be Granted To Review Inconsequential Rulings Of An Evidentiary Nature 21

V. The District Court's Imposition Of Costs On McAuliffe In His Individual Capacity Does Not Constitute A Basis For Granting Certiorari 22

VI. Certiorari Has Never Been Granted In Any Case For The Purpose Of Reviewing A Finding Of Non-Obscenity 23

Conclusion 24

Affidavit Of Service 25

Respondent's Appendix A-1

TABLE OF AUTHORITIES

Cases **Page**

Bonner v. City of Prichard, Alabama, 661 F.2d 1206 (11th Cir. 1981) 5

California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater, 454 U.S. 90 (1981) 15, 16

Cohen v. Public Housing Administration, 257 F.2d 73 (5th Cir 1958) 13

Ginzburg v. United States, 383 U.S. 463 (1966) 19

Hamling v. United States, 418 U.S. 87 (1974) 20, 22

Henderson v. Fort Worth Independent School District, 584 F.2d 115 (5th Cir. 1978) 6

Kois v. Wisconsin, 408 U.S. 229 (1972) 19

McKinney v. Alabama, 424 U.S. 669 (1976) 16

Miller v. California, 413 U.S. 15 (1973) ..... *passim*

Mishkin v. New York, 383 U.S. 502 (1966) 17

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) ... 21

Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980) 5, 7, 13, 19

Penthouse International, Ltd. v. McAuliffe, 702 F.2d 925 (11th Cir. 1983) 5, 13, 14

Penthouse International, Ltd. v. McAuliffe, 717 F.2d 517 (11th Cir. 1983) 1

Penthouse International, Ltd. v. McAuliffe, No. 80-2172A (N.D. Ga. May 15, 1981) ..... *passim*

Pinkus v. United States, 436 U.S. 293 (1978) 17

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 19

Ross v. Moffit, 417 U.S. 600 (1974) 15

Roth v. United States, 354 U.S. 476 (1957) 17, 18

TABLE OF AUTHORITIES (Continued)

Page

Cases (Continued)

Septum, Inc. v. Keller, 614 F.2d 456 (5th Cir. 1980) 5, 7, 13

Shenker v. Baltimore & Ohio R.R. Co., 374 U.S. 1 (1963) 6

Smith v. United States, 431 U.S. 291 (1977) 14, 17, 19, 24

Splawn v. California, 431 U.S. 595 (1977) 20

Steffel v. Thompson, 415 U.S. 452 (1974) 5, 7, 11, 12, 13

The Flintkote Co. v. Dravo Corp., No. C79-1107A (N.D. Ga. June 8, 1983) 23

United States v. 35 MM. Motion Picture Film, 432 F.2d 705 (2d Cir. 1970) 18

Western Pacific R. R. Corp. v. Western Pacific R. R. Co., 345 U.S. 247 (1953) 6

Constitutional Provisions

U.S. Const., Amend. I 2, 3, 7, 12, 13

U.S. Const., Amend. XIV 2, 3

Statutes

19 U.S.C. §1305 3

28 U.S.C. §1254 ..... 2, 10

28 U.S.C. §1331 11

28 U.S.C. §1332 11

28 U.S.C. §1343(3) 11

28 U.S.C. §2201 ..... 10, 11, 13

O.C.G.A. §16-12-80 ..... 11, 12, 20

O.C.G.A. §24-4-5 ..... 2, 16

Other Authorities

Sup. Ct. R. 17.1 ..... 7, 9, 10
Sup. Ct. R. 28.3 25
Sup. Ct. R. 40.3 10
Fed. R. App. P. 39 23
Fed. R. Civ. P. 39(c) 14
Fed. R. Civ. P. 52 ..... 19, 21
Fed. R. Civ. P. 54(d) 23
U.S.D.C. Northern Dist. of Ga. Local Rule 351.1 ... 2, 23
Suetonius, *The Twelve Caesars* 3

Case No. 83-1160

IN THE

Supreme Court of the United States

October Term, 1983

HINSON McAULIFFE, Individually; and
JAMES L. WEBB, as Solicitor General for the
County of Fulton, State of Georgia,
Petitioners,

v.

PENTHOUSE INTERNATIONAL, LTD.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Penthouse International, Ltd. ("Penthouse") respectfully requests that this Court deny the petition for certiorari, seeking review of the Eleventh Circuit's judgment and opinion in this case. That opinion is reported at 717 F.2d 517.[1]

[1] Petitioners have mistakenly reproduced a draft of this opinion in their Appendix. Respondent has reproduced the published opinion in its Appendix included herein.

JURISDICTION

Respondent does not contest this Court's jurisdiction to consider this Petition for Writ of Certiorari pursuant to 28 U.S.C. §1254(1), to the extent that petitioner attempts to seek review of the judgment of the Court of Appeals for the Eleventh Circuit, entered on October 17, 1983. However, to the extent that petitioner in substance seeks a review of the district court's written opinion, entered May 15, 1981, respondent contends the Petition presents matters beyond the jurisdictional ground of 28 U.S.C. §1254 or any other applicable law.

STATUTORY PROVISIONS INVOLVED

Most pertinent statutory provisions are set out in the Appendix to the Petition. In addition, this case involves the First and Fourteenth Amendments to the United States Constitution; 28 U.S.C. §1254(1); O.C.G.A. §24-4-5; and Local Rule 351.1 of the United States District Court, Northern District of Georgia. All pertinent portions of these authorities are reproduced in the Appendix herein.

STATEMENT OF THE CASE

Respondent sets out this Statement of the Case due to the omissions and inaccuracies in petitioner's Statement.[2]

Caligula was filmed in 1976 in Rome, Italy (T. 696). It was edited in London, and was finished for distribution in 1979 (T.696, 697). The film was imported to the United

[2] The petitioner's case statement improperly contains material which is not in the record below, *inter alia*, (1) references to reviews by movie critics Gary Arnold (Pet., p.3), Joseph Gelmis, Stanley Kauffman (Pet., p.4), and Oswyn Murray (Pet., p.5, n.8); (2) reference to the amount *Variety* magazine has estimated the movie has now grossed (Pet., p.5).

States and submitted to the United States customs officials for the purpose of a determination concerning whether the film should be seized as obscene under the provisions of 19 U.S.C. §1305 (T.681). The film was reviewed by the Department of Justice, and thereafter the Department of Customs admitted the film to the United States with permission to exhibit (T.684.)

Caligula is a film which deals with the life of the Roman Emperor Gaius Caligula, and the condition of Roman society beginning with the time shortly before the Emperor Gaius Caligula became a Caesar in 37 A.D., and ending with his assassination in 41 A.D. (Exhibit 5). The film is based in part on the account of Caligula's reign as told by Suetonius in *The Twelve Caesars* (Exhibit 1). The film utilizes lavish sets and has a cast of internationally acclaimed stars, including Peter O'Toole, Sir John Geilgud, Malcolm McDowell, Theresa Anne Savoy and Helen Mirren (Exhibit 5); (T.406, 407). By the time of trial, *Caligula* had been exhibited in numerous foreign countries (T.724) and was booked for exhibition in many others (T.725). In the United States, *Caligula* was viewed by an estimated 1,667,994 people in its first eleven months of circulation (T.721, 722), and grossed $9,256,924.00 during those first eleven months (T.725). At the time of trial, the film had been exhibited in over one hundred cities in the United States (Pet. App., p. 19).

The constitutional question was clearly framed in the district court. The complaint alleged *Caligula* was not obscene under the Georgia criminal obscenity statute as constitutionally applied, and sought a declaration that *Caligula* was not obscene under the First and Fourteenth Amendments to the United States Constitution (R.4). On April 10, 1981 the trial court conducted a pre-trial

conference and entered a comprehensive pre-trial order (R.217). In this pre-trial order, Penthouse stated the issue in the case was whether the motion picture, *Caligula*, was obscene under the Georgia obscenity statute, "as restricted by the First and Fourteenth Amendments." (R. 220). The pre-trial order also specified that Penthouse claimed it had been deprived of its constitutional rights (R.220). In this same pre-trial order, petitioner McAuliffe admitted, as discussed *infra*, that there were no questions concerning the trial court's jurisdiction (R.218).

Petitioner McAuliffe correctly notes there was much expert evidence at the trial court (Pet., pp.6-7). However, petitioner fails to acknowledge that the overwhelming effect of the evidence was to demonstrate the film had serious artistic and political value. Among the most notable experts were the following: Dr. Robert Sklar, chairman of the largest department of cinema studies in the United States at New York University (T.340) (whose definition of serious artistic value is quoted by petitioner (Pet., p.7), who testified without reservation that the film had serious artistic value; Dr. James W. Prothro, Professor of Political Science at the University of North Carolina (T.572), who testified that numerous political themes were developed in the film; Dr. Thomas Africa, Professor of Ancient, Greek and Roman History, State University of New York (T.453), who testified that the film was in large part, faithful to the description of the reign of Gaius Caligula as written by Suetonius (T.453-505). Dr. Downing C. Tait, a prominent Atlanta psychiatrist and Emory medical school faculty member persuasively testified that, applying contemporary community standards, *Caligula* does not appeal to the prurient interest (T.93-133). Based on the above testimony and his own viewing of the movie, Judge Freeman entered his judgment and opinion that *Caligula* is not obscene. The

advisory jury likewise found the film was not obscene. Contrary to the statement of petitioner that the trial court used a "reasonable doubt" standard of proof in its determination (Pet., p.8), respondent submits, as discussed *infra*, that the record is unclear in this regard. It should be emphasized that the trial court opinion is unpublished.

On April 11, 1983, the three judge panel of the Eleventh Circuit entered its decision (*Penthouse International, Ltd. v. McAuliffe*, 702 F.2d 925). In this two to one decision, the panel remanded the case to the district court for a determination of whether the district court's ruling constituted a ruling on a matter of constitutional law, or a declaratory judgment concerning matters of state criminal law. Both the panel majority (Judges Tjoflat and Henderson) and the minority (Judge Lynne) specifically accepted the district court's findings that McAuliffe had actually threatened to prosecute for the showing of *Caligula*, and that, as a result, Penthouse could not obtain an exhibitor in Fulton County (702 F.2d 927, n.5).[3]

In its suggestion for rehearing *en banc* of the panel decision, respondent Penthouse argued that the panel's holding was directly contrary to *Steffel v. Thompson*, 415 U.S. 452 (1974); and to controlling precedent, *Septum, Inc. v. Keller*, 614 F.2d 456 (5th Cir. 1980); and, *Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980).[4] Respondent Penthouse argued that the panel

[3] Respondent agrees with petitioner (Pet., p.9, n.10) that the case should not be remanded for a determination of mootness. Respondent represents, however, that to its knowledge the movie *Caligula* is no longer being exhibited, at least in its uncut version, in Fulton County. Nonetheless, Penthouse cannot represent that it will never again run the original version in Fulton County, Georgia.

[4] *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981) adopted Fifth Circuit authority as precedent for the new Eleventh Circuit.

majority decision in effect rewrote the substantive test for obscenity set out in *Miller v. California*, 413 U.S. 15 (1973).[5]

Penthouse argued to the Eleventh Circuit *en banc* that the panel decision should be vacated and the opinion of the district court affirmed. The *en banc* court vacated the panel decision, and affirmed the district court opinion as a matter of law because it was evenly divided on a proper disposition of the case. The court's *en banc* decision states that no opinion will be published because it would be of no precedential value (R. App., p.A-1).[6]

SUMMARY OF ARGUMENTS PRESENTED

1.

Petitioner is in essence arguing that certiorari should be granted based on a district court opinion. McAuliffe does not even attempt to argue that the *en banc* opinion of the Court of Appeals (which affirmed the district court opinion as a matter of law and in so doing did not set any

[5] The test for obscenity is: "whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. 15 at 24.

[6] Contrary to the argument attempted in the Brief Amici Curiae by Charles H. Keating, Jr., and Citizens for Decency through Law, Inc., the rendering of an evenly divided *en banc* decision of no precedential value is not alone reason for this Court to accept certiorari. *Henderson v. Fort Worth Independent School District*, 584 F.2d 115 (5th Cir. 1978) (*en banc*), *cert. denied*, 441 U.S. 906 (1979) (cited in the *en banc* decision in this case). Moreover, this Court has previously held that procedural issues concerning *en banc* hearings are matters for the courts of appeals themselves and will not be ordinarily reviewed by the Supreme Court. *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963); *Western Pacific R.R. Corp. v. Western Pacific R.R. Co.*, 345 U.S. 247 (1953).

precedent), in and of itself constitutes a reason to grant certiorari. Petitioner has failed to present any reason contained in Sup. Ct. R. 17.1 why certiorari should be granted.

2.

Petitioner's arguments that the district court's unpublished opinion is worthy of review in this Court are without merit. Each of petitioner's "Reasons for Granting the Writ" fail. First, because the record at the trial court level simply does not present the issues raised by petitioner in a clear manner, if at all. Second, the trial court was correct on the merits. Third, the case does not lend itself for review by this Court under any theory of important federal question, because a finding of non-obscenity does not require an independent review to insure that First Amendment rights are being protected. In fact, to respondent's knowledge, this Court has never accepted certiorari review from a finding of non-obscenity in the lower courts.

3.

Petitioner argues that no declaratory judgment jurisdiction exists where application of a state obscenity criminal statute is involved. The argument fails to recognize that here, First Amendment constitutional rights of respondent were being threatened. Federal courts have exercised declaratory judgment jurisdiction in instances such as these. *Septum, supra; Penthouse*, 610 F.2d 1353, *supra*. Moreover, this Court provided for protection of First Amendment rights through this very procedure. *Steffel v. Thompson, supra*, 415 U.S. 452. Certainly, actions for declaratory judgments can and do involve factual adjudications.

4.

Next, petitioner argues that the reasonable doubt standard should not have been utilized. Even if the record were clear that this were the case, even if the reasonable doubt standard should not have been utilized, and even if the record did not support a finding of non-obscenity by a preponderance, this Court should not grant a writ to review an error of law in the trial court.

5.

Petitioner argues that the trial court's interpretation of prurient interest to mean that the material must stimulate the prurient interest of the average person, as opposed to shocking or offending him, conflicts with *Miller* and makes the *Miller* obscenity test meaningless. Even if the record clearly demonstrated that this was the interpretation used by the trial court, this interpretation does not conflict with *Miller* or other applicable decisions of this Court. Moreover, material can be stimulating in a prolonged manner, as a whole, but still be patently offensive under the "patently offensive" prong of the *Miller* test. The point is, the movie *Caligula* contains many, many segments of other than explicit sexual scenes, and the district court correctly found it did not appeal to the prurient interest.

6.

Petitioner argues that this Court should grant certiorari to flesh out the meaning of "serious value". McAuliffe believes the trial court should have considered whether the movie, *Caligula*, was a serious attempt at movie making by examining the intent of the producers, as well as by examining the actual effect of the movie on viewers. To buttress his position, McAuliffe cites to alleged errors

in the exclusion of evidence. This is clearly not an appropriate case to grant certiorari for the purpose of further developing the meaning of serious value under *Miller*. There is no court of appeals opinion directed at this point in this case. The district court decision is not published. The serious value test was developed as a way to safeguard against the vagaries of jury selection which could result in jury findings of obscenity in instances when the material had serious value. Certiorari review here would reverse the purpose of the serious value test, because it would be using certiorari review to second guess a finding of non-obscenity.

7.

Finally, petitioner complains of the taxation of costs against him, individually, at the trial court level. Even if this were error, it does not present an important federal question, and appears to be moot. Respondent has never sought taxation of trial court costs against petitioner, individually, or otherwise. It appears that by local rule, respondent cannot do so now. Respondent reserves the right to seek taxation of appellate costs, but that is not at issue here.

REASONS THE PETITION SHOULD BE DENIED

I. THE DISTRICT COURT'S EXERCISE OF JURISDICTION DOES NOT CONSTITUTE A BASIS FOR CERTIORARI JURISDICTION.

A. The Requirements Of Sup. Ct. R. 17.1 Have Not Been Met.

Petitioner does not contend that the actual Eleventh Circuit *en banc* decision falls within the grounds for certiorari set forth in either Sup. Ct. R. 17.1(a) or 17.1(c).

Petitioner[7] has failed to allege any basis for this Court's review of the Eleventh Circuit opinion pursuant to Sup. Ct. R. 17.1. The Eleventh Circuit *en banc* court was equally divided on the proper disposition of the district court decision. The court of appeals wrote no *en banc* opinion, and the district court decision, which was not published, was affirmed by operation of law. The certiorari procedure provides a way for this Court to exercise its discretionary jurisdiction to review decisions of the courts of appeal. 28 U.S.C. §1254. This Court has no jurisdiction to review judgments of the district courts by writ of certiorari. 28 U.S.C. §1254. The Eleventh Circuit *en banc* affirmance without opinion does not decide an important question of federal law. Likewise, the Eleventh Circuit decision does not decide a federal question in a way which conflicts with any applicable decision of this Court. Petitioner does not attempt to argue that the actual Eleventh Circuit *en banc* ruling calls for the exercise of this Court's power of supervision. Thus, there is no need to review the Eleventh Circuit's *en banc* decision. Petitioner's attempt to use the district court's unpublished opinion as a basis for certiorari review amounts to an attempt to obtain review by certiorari of a district court decision.

B. The District Court's Exercise Of Jurisdiction Under 28 U.S.C. §2201 Does Not Raise Any Important Question Of Federal Law, And Does Not Conflict With Applicable Decisions Of This Court.

The district court conducted a trial, and entered a

[7] Although the Petition was filed by both Mr. McAuliffe and his successor in office, James L. Webb, Mr. Webb was not involved or named in any of the proceedings below. Therefore, respondent will refer to petitioners as petitioner, in the singular, or to "McAuliffe." Penthouse knows of no order of substitution entered under Sup. Ct. R. 40.3.

judgment on May 15, 1981 pursuant to 28 U.S.C. §2201. Petitioner misleads this Court by attempting to argue that the question of subject matter jurisdiction was litigated in the district court. Contrary to what petitioner intimates (Pet., p.11, n.11) the question of jurisdiction was not contested in this case. The pre-trial order specifically provided that the parties were in agreement that jurisdiction was founded on 28 U.S.C. §§1331, 1332 and 1343(3), and that there were no questions concerning the court's jurisdiction. (R.218).

Petitioner himself counterclaimed seeking a declaratory judgment that *Caligula* was obscene under O.C.G.A. §16-12-80 (R.45-46). Thus, petitioner McAuliffe expressly stipulated jurisdiction in the pre-trial order and expressly invoked the district court's jurisdiction by asserting a counterclaim for a declaratory judgment that *Caligula* was obscene. Therefore, even if McAuliffe were correct in principle, the record below does not support a review of the matter. Now that petitioner McAuliffe has lost the trial, he should be estopped from asserting as a ground for acceptance of certiorari, that the district court should not have exercised declaratory judgment jurisdiction.

Assuming petitioner's belated and contradictory attempt to question the district court's jurisdiction can now be considered, petitioner's argument is without merit. Petitioner is unable to cite any decision of this Court in support of his argument that the district court improperly assumed jurisdiction in this case. Indeed, petitioner concedes that *Steffel v. Thompson*, 415 U.S. 452 (1974) holds that where it is contended that a genuine threat of state prosecution will infringe constitutional rights, federal declaratory relief is available. Petitioner concedes that declaratory relief is available even though the state

statute is facially constitutional and the requirements for injunctive relief are not met. Finally, petitioner concedes "that there is no question in the instant case but that respondent was the subject of a genuine threat of prosecution." (Pet., p.11). Unable to cite supporting authority for his position, and forced to concede the general availability of declaratory relief to protect First Amendment rights under *Steffel*, petitioner is relegated to attempting to distinguish *Steffel* on superficial grounds. Thus, petitioner argues that in the instant case, the issue presented to the district court was merely whether conduct satisfied the elements of a state criminal statute.

Petitioner's basic tenet, that the district court should not advise parties concerning whether proposed conduct would violate state criminal law, can be successfully applied to many crimes such as larceny, embezzlement and murder. However, the relationship between state obscenity laws and the *Miller* test for protected speech requires a different analysis when the alleged crimes involve state obscenity statutes. The question of whether certain conduct constitutes larceny, embezzlement, or most other state crimes, does not involve a determination of a constitutional right. However, obscenity and protected First Amendment speech are mutually exclusive in law. An allegation that *Caligula* is protected by the First Amendment is necessarily an allegation that *Caligula* is not obscene under O.C.G.A. §16-12-80, or any other state obscenity statute. Because the Georgia obscenity statute tracks the *Miller* test for obscenity, a trial on the question of obscenity as defined in *Miller* involves the same evidence and the same substantive decisions as a trial under O.C.G.A. §16-12-80. As Judge Lynne stated in his dissent from the vacated Eleventh Circuit panel decision:

> It would be anomalous to suggest that it is possible to adjudicate the question of whether material is obscene under the Georgia statute without resolving at the same time whether such material is protected by the First Amendment within the *Miller* definition of obscenity since out of the facts the law arises.

702 F.2d at 930. As in *Steffel*, the question in the instant case is whether a prosecution threatened under a state criminal statute abridged rights guaranteed by the First Amendment. The district court properly assumed jurisdiction of this issue. In so doing, it was following controlling precedent. *Septum, Inc. v. Keller, supra*, 614 F.2d 456; *Penthouse International, Ltd. v. McAuliffe, supra*, 610 F.2d 1353.

As a makeweight argument, petitioner also contends that even if the district court properly assumed subject matter jurisdiction in this case, the district court erred in proceeding to adjudicate facts. Petitioner fails to cite any decision by this Court to support the novel idea that a United States district court cannot adjudicate facts in the process of adjudicating rights under the declaratory judgment act. Such a holding would restrict the district courts to entering declaratory judgments only as to matters of law. Nothing in the declaratory judgment act restricts the district court's power to only those cases in which issues may be decided "as a matter of law" or as a "matter of federal constitutional law". Rather, the declaratory judgment act gives the district court the power to declare "the rights and legal relations of any interested party . . ." in a case of actual controversy. 28 U.S.C. §2201. Indeed, actions for declaratory judgment have traditionally involved adjudications of fact, e.g., *Cohen v. Public Housing Administration*, 257 F.2d 73 (5th Cir. 1958), *cert. denied*, 358 U.S. 928. Certainly a determina-

tion of obscenity under *Miller* requires factual determinations. *Smith v. United States*, 431 U.S. 291 (1977).

II. EVEN ASSUMING THE DISTRICT COURT USED THE REASONABLE DOUBT STANDARD OF PROOF, AND THAT THIS WAS ERROR, THIS IS NOT A BASIS FOR GRANTING CERTIORARI.

A. The Record Is Unclear As To Whether The District Court Utilized The Reasonable Doubt Standard.

McAuliffe argues (Pet., p.16) that the trial court employed a reasonable doubt standard of proof and that, because this was legal error, this Court should grant review by issuance of writ of certiorari. Nowhere in the district court's opinion does the district court state that it is deciding the case based on the reasonable doubt standard of proof. McAuliffe is misleading the Court in stating otherwise (Pet., p.16). The most the opinion reveals is that the advisory jury (impaneled pursuant to Fed. R. Civ. P. 39(c)) was instructed to use the reasonable doubt standard of proof and that, in the words of Judge Lynne (the dissenting judge on the panel below), because of this, it was reasonable to assume that the trial judge applied the standard. 702 F.2d at 930 (Pet., p.16, n.12). Not only is McAuliffe unable to point to a court of appeals decision for this Court to review; even the unpublished district court opinion does not crystallize the issue petitioner seeks to present. Absent a clear ruling by the trial court as to the standard of proof which it applied, there is no reason whatsoever to grant certiorari as to this matter. Moreover, the evidence supports a finding of non-obscenity even under a preponderance of the evidence standard.

B. Legal Error Is Not A Basis For Issuance Of A Writ.

Assuming *arguendo* that the trial court did indeed employ a reasonable doubt standard of proof and that the standard was incorrect as a matter of law, this Court should not grant certiorari jurisdiction to correct an alleged legal error at the trial court level. This Court is not primarily concerned with the correction of legal error in the lower courts. *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974).

Here, the claimed legal error is not even argued to rise to constitutional dimensions. Instead, petitioner argues that in declaring *Caligula* not obscene, the district court precluded the use of the Georgia civil nuisance remedy where a lesser standard of proof than reasonable doubt would have been used (Pet., p.17). But the civil nuisance statutes were not at issue.

C. The Standard Of Proof Utilized Does Not Conflict With Any Decisions Of This Court.

McAuliffe argues that the district court's use of the reasonable doubt standard in the context of a civil declaratory judgment action conflicts with *California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater*, 454 U.S. 90 (1981). In *Cooper*, this Court established that the United States Constitution does not require states to prove obscenity beyond a reasonable doubt. The nature of the relief sought below distinguishes this case from *Cooper*. Here, Penthouse sought a declaration that the movie *Caligula* did not violate the criminal obscenity statute of Georgia, and asked for injunctive relief against

prosecutions related to its exhibition. In *Cooper*, the city sought an injunction under the civil nuisance abatement statutes to prohibit the exhibition of an arguably obscene motion picture. In *Cooper*, the California civil nuisance statutes allowed proof by a preponderance of the evidence. By contrast, Georgia requires proof of criminal obscenity beyond a reasonable doubt. O.C.G.A. §24-4-5. Use of the civil standard of proof by the trial court here would have made the declaratory judgment action pointless. For example, had the district court below held that by a preponderance of the evidence the movie was obscene, Penthouse would have remained uncertain as to whether exhibition of *Caligula* could result in criminal conviction under a reasonable doubt standard. The views of Justice Brennan, as expressed in *McKinney v. Alabama*, 424 U.S. 669, 683-684 (1976), apply here in principle.

III. THE DISTRICT COURT'S INTERPRETATION OF PRURIENT INTEREST AS APPLIED IN ITS FACT FINDINGS CANNOT BE THE BASIS FOR GRANTING CERTIORARI.

McAuliffe attempts to argue that this Court should grant certiorari based on alleged erroneous instructions to an advisory jury (Pet., pp.18-19). Petitioner argues that the district court erred when it instructed the advisory jury that in order to satisfy the prurient interest prong of the *Miller* test, the material had to appeal to the prurient interest *of the average person*, rather than to the average person's prurient interest. Even if the instructions were in error, they were to an *advisory* jury. In the district court opinion itself, the court states "that to the average person applying contemporary community standards, the film *Caligula*, viewed in its entirety, does not appeal to the prurient interest in sex" (R.335; Pet. App.,

p.25). This holding by the district court is clearly in accord with the authorities on which petitioner relies (Pet., p.20), and is perfectly consistent with petitioner's semantics concerning the wording of the prurient interest test. No conflict exists between the district court's opinion and this Court's decisions. Moreover, many Supreme Court authorities state the test in the phraseology used by the district court to the advisory jury, *i.e.*, whether the material appeals to the interest of the *average person*. *Miller*, *supra*, 423 U.S. at 33; *Smith*, *supra*, 431 U.S. 291 at 304; *Pinkus v. United States*, 436 U.S. 293 at 302, 303 (1978). Penthouse submits McAuliffe's "prurient interest" argument is a matter of semantics, with no substantive difference.

McAuliffe argues (Pet., pp.19-20) that the district court erred in interpreting "prurient interest" to mean that the material had to sexually stimulate the viewer, and erred in finding that the movie did not appeal to the prurient interest because the tendency of *Caligula* was, instead, to "inhibit sexual stimulation" (Pet. App., p.25). McAuliffe argues that such an interpretation of the test is in conflict with *Mishkin v. New York*, 383 U.S. 502 (1966). *Mishkin* holds that where materials are aimed at a deviant group, they must be judged on the basis of prurient appeal to that group rather than on their appeal to the average person. *Mishkin* does not hold that materials intended for the general public which offend or sicken the average person satisfy the pruriency requirement.

Contrary to petitioner's contention, the trial court recognized that appeal to the prurient interest means a "shameful or morbid interest in nudity, sex, or excretion" and correctly noted that in *Roth v. United States*, 354 U.S. 476, 487, n.20 (1957) the Court found that to be "pruri-

ent" the material must have a "tendency to excite lustful thoughts."[8] The trial court's interpretation is in accord with that of other courts. (*United States v. 35 MM. Motion Picture Film*, 432 F.2d 705 (2d Cir. 1970).

McAuliffe argues that the district court's interpretation of the prurient interest test is in conflict with the patently offensive prong of the obscenity test. McAuliffe's argument is that if "prurient" is interpreted to mean erotic or stimulating, the subject material can not satisfy the patently offense test. The argument is without merit. First, the argument misstates the district court's interpretations of the obscenity test. As set forth above, the district court acknowledged both interpretations of the prurient interest test: (i) that the material must predominantly appeal to a shameful or morbid interest in sex, nudity or excretion; and (ii) that the material must have a tendency to excite lustful thoughts. (Pet. App., pp. 22-23). Having acknowledged these two interpretations, the district court found as fact that applying contemporary community standards, the film, taken as a whole, did not appeal to the prurient interest. Second, McAuliffe's argument assumes that material which is erotic or stimulating cannot also satisfy the patently offensive prong of the test. This inquiry is not a matter of logic; rather, it involves a matter of evidence which must be determined in a trial in light of specific evidence. Third, McAuliffe's argument misunderstands the scope of the patently offensive test. While the prurient interest test focuses on the material taken as a whole, the patently offensive test is satisfied by examining isolated parts of the material. Thus, material taken as a whole could be

[8] The district court also correctly noted that the *Roth* definition of prurience was adopted by the *Miller* court (Pet. App., p.23).

erotic, or stimulating such that it appeals to the prurient interest. The same material could have distinct portions which satisfy the patently offensive portion of the test. The above approach, followed by the district court, puts these two portions of the obscenity test in their proper perspective. Using this approach, the district court found *Caligula* did contain portions which were patently offensive; thus, this portion of the obscenity test was satisfied. However, the court found the film, *taken as a whole*, did not appeal to the prurient interest. This fact finding is not clearly erroneous. Indeed, this Court should not undertake certiorari review for the purpose of considering the sufficiency of the evidence on this point.[9]

IV. THE DISTRICT COURT'S FINDING THAT *CALIGULA* HAS SERIOUS VALUE CANNOT BE THE SUBJECT OF CERTIORARI JURISDICTION.

A. The District Court's Construction And Application Of The Serious Value Test Does Not Conflict With Applicable Decisions Of This Court And Is Not Of Great Importance.

McAuliffe argues that the district court's unpublished opinion somehow conflicts with this Court's rulings. First, petitioner argues the opinion conflicts with *Kois v. Wisconsin*, 408 U.S. 229 (1972) and *Ginzburg v. United States*, 383 U.S. 463 (1966) to the effect that a court must consider whether the material is a sham (Pet., p.23). The

[9] In order to prevail in this argument, petitioner would have to show that the court's ruling was clearly erroneous under Fed. R. Civ. P. 52. There should be no independent review by an appellate court as to prurient interest. *Smith v. United States*, *supra*, 431 U.S. at 300, 301; *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *but see*, *Penthouse International, Ltd. v. McAuliffe*, *supra*, 610 F.2d 1353 (5th Cir. 1980), which was a decision resulting from earlier litigation between these parties.

record is clear that the district court did indeed properly consider whether the movie was a "sham", and decided it was not (Pet. App., p.27).

Second, McAuliffe cites to *Splawn v. California*, 431 U.S. 595, 598-9 (1977) and to O.C.G.A. §16-12-80(d) for the proposition that the district court erred in not considering evidence of pandering (Pet., p.24). But, pandering is only present when material is disseminated to persons without their consent. *Hamling v. United States*, 418 U.S. 87 (1974). There was no evidence of this nature in the case at bar.

Third, McAuliffe attempts to argue that the district court's exclusion of certain reviews by film critics for consideration by an advisory jury conflicts with the authorities listed in pp.26-27 of the Petition. However, there is no conflict because the cases cited do not apply here. None of those cases hold that unsworn, written hearsay opinions, which are not subject to cross-examination, may be admitted over objections by opposing counsel at the trial court level as evidence on the issue of serious value.

Petitioner argues that this Court should accept certiorari because the question of what constitutes "serious value" is an important federal question which deserves review (Pet., p. 28). McAuliffe argues that a proper interpretation must consider two elements, the effort or purpose of the material, and whether or not the material communicates this factor (Pet., p.23). Because the district court did not utilize the interpretation set forth by McAuliffe, McAuliffe argues that certiorari would be proper (Pet., p.23). Even if this Court agrees that the question of what constitutes "serious value" needs to be examined in further detail, this case is not in a posture for

appropriate review of this matter. There is no court of appeals opinion on this or any other point. The unpublished district court opinion was based on ten days of trial testimony. The district court's finding of serious value is not subject to reversal under the clearly erroneous standard of Fed. R. Civ. P. 52.

Finally, the serious value prong of the *Miller* test was developed to provide a constitutional safeguard against the vagaries of jury selection. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 102 (1973) (Brennan, J., dissenting). It enables appellate courts to review findings of obscenity to be sure material which has sufficient merit is not being restricted from dissemination by findings of obscenity. Respondent's research has not disclosed any instance in which this Court has granted certiorari to review a finding or verdict of non-obscenity. Respondent submits certiorari review should not be undertaken for this purpose.

B. Certiorari Should Not Be Granted To Review Inconsequential Rulings Of An Evidentiary Nature.

Much of the petitioner's argument regarding "serious value" is based on complaints that the district court improperly excluded evidence which supported McAuliffe's interpretation of the serious value test (Pet., pp.24-27). Surely this Court should not accept certiorari to review inconsequential evidentiary rulings made at the district court level for the benefit of an advisory jury, even if they did constitute legal error. The rulings on evidentiary matters complained of by petitioner can be summarized as follows: (1) the exclusion of testimony related to the intent or purpose of the makers of the movie *Caligula* (Pet., p.24); (2) the exclusion of evidence of promotion or advertising to show commercial exploitation of erotica

(Pet., p.24); (3) the refusal by the district court to adopt findings of the advisory jury that the movie lacks serious artistic or political value (Pet., p.26); (4) the arguments that the court's fact findings as to serious value are against the weight of the evidence (Pet., pp. 26-27); (5) the exclusion of evidence relating to critical reviews of the movie *Caligula* (Pet., pp. 26-27); and (6) the failure of the district court to seriously consider the historical accuracy of the movie (Pet., p.25). Not one of these evidentiary matters is of sufficient import to require certiorari to be granted, even if they were in error. The reasons for excluding the evidence were valid, either in light of *Hamling v. United States*, *supra*, 418 U.S. 87, 127 (evidence in obscenity case excluded because it was confusing or cumulative to a jury) (R.1128-1129); or in light of applicable authorities discussed above. Moreover, the jury before whom the evidence was excluded was sitting in an advisory capacity only. In many instances the trial court had had the benefit of reviewing much of the excluded evidence in advance. (See, *e.g.* critical reviews, marked as Defendant's Exhibits 1-17.) Petitioner cannot seriously argue harmful error.

V. THE DISTRICT COURT'S IMPOSITION OF COSTS ON McAULIFFE IN HIS INDIVIDUAL CAPACITY DOES NOT CONSTITUTE A BASIS FOR GRANTING CERTIORARI.

Petitioner argues that since McAuliffe acted only in his official capacity (T. 657) and since there was arguably no evidence that he acted in bad faith, it is an important federal question whether or not to allow costs against McAuliffe in his individual capacity (Pet., pp.28-29). Even if McAuliffe acted in good faith, legal error by the trial court is not a reason for granting certiorari. Con-

trary to the words of petitioner that the decision constitutes "frightening precedent" (Pet., p.29), the precedential value of an unpublished district court opinion is at best of dubious import.

At any rate, the decision was correct and is supported by the record (R.13-34). The court has the power to tax costs individually against officials in situations such as this pursuant to Fed. R. Civ. P. 54(d). The crucial point for certiorari jurisdictional purposes is that petitioner's argument appears to be moot. Penthouse never submitted any cost bill for trial costs and apparently cannot do so now.[10]

Rule 351.1 of the Local Rules for the United States District Court, Northern District of Georgia, states that a bill of costs must be filed within thirty days after entry of judgment, or such costs will not be allowed as part of the judgment. In the case, *The Flintkote Co. v. Dravo Corp.*, No. C79-1107A (N.D. Ga. June 8, 1983) the court ruled that the word "judgment" in Local Rule 351.1 does not mean return of a mandate after appeal. That is, even where an appeal is filed, the local rule time limits for filing costs must be compiled with. In light of this case, Penthouse never submitted a bill for costs at the district court level. Penthouse filed a bill for costs on appeal pursuant to Fed. R. App. P. 39. For the above reasons, this Court should refuse to accept certiorari of matters relating to district court costs.

VI. CERTIORARI HAS NEVER BEEN GRANTED IN ANY CASE FOR THE PURPOSE OF REVIEWING A FINDING OF NON-OBSCENITY.

Although petitioner argues (Pet., p.28) that this Court

[10] It should be noted that no attorneys' fees were sought to be taxed against McAuliffe, either individually or otherwise; and, of course, none were assessed.

should independently review "serious value" and "prurient appeal," citing *Smith, supra*, Penthouse has not been able to find any case in which this Court has granted certiorari in order to review a finding of non-obscenity under the serious value prong or any other prong of the *Miller* test. For reasons discussed above, respondent submits that this Court should not undertake certiorari review of findings of non-obscenity.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

GAMBRELL & STOLZ

By: /S/
JAMES L. PAUL

By: /S/
KATHARINE C. ROBEY

3900 First Atlanta Tower
Atlanta, Georgia 30383
(404) 658-9150

NORMAN ROY GRUTMAN
RICHARD E. HAHN
Grutman, Miller,
Greenspoon & Hendler
505 Park Avenue
New York, New York 10022
(212) 888-1900

Attorneys for Respondent
Penthouse International, Ltd.

AFFIDAVIT OF SERVICE

STATE OF GEORGIA
COUNTY OF FULTON

I, James L. Paul, of Atlanta, Georgia, do hereby swear that on this 10th day of February, 1984, three copies of the Respondent's Brief in Opposition to the Petition for Writ of Certiorari were mailed, first class postage prepaid, to counsel at their addresses below, pursuant to Rule 28.3 of the Supreme Court Rules:

George M. Weaver
2100 Trust Company Tower
25 Park Place
Atlanta, Georgia 30303
Counsel for Petitioner

Bruce A. Taylor
Paul C. McCommon
2331 W. Royal Palm Road, #105
Phoenix, Arizona 85021
Counsel for Amici

I further swear that all parties required to be served have been served.

JAMES L. PAUL
3900 First Atlanta Tower
Atlanta, Georgia 30383
Counsel of record for Respondent

Sworn to and subscribed before me this 10th day of February, 1984.

Notary Public for the
State of Georgia at Large

My Commission Expires: _____.

APPENDIX

PENTHOUSE INTERNATIONAL, LTD.,
Plaintiff-Appellee,

v.

Hinson McAULIFFE, Individually and as Solicitor General for the County of Fulton, State of Georgia, Defendant-Appellant.

No. 81-7426.

United States Court of Appeals,
Eleventh Circuit.

Oct. 17, 1983.

George Weaver, Atlanta, Ga., for defendant-appellant.

Grutman, Schafrann & Miller, Norman Roy Grutman, New York City, Gambrell & Mobley, James L. Paul, Atlanta, Ga., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Georgia; Richard C. Freeman, Judge.

Before GODBOLD, Chief Judge, and RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

The court voted to consider this case en banc, which resulted in the panel opinion being vacated, 702 F.2d 925. The judges of the en banc court, having heard oral argument and considered the case, are equally divided on the proper disposition. The judgment of the district court is therefore AFFIRMED by operation of law, and this decision by the court of appeals has no precedential value. *Henderson v. Fort Worth Independent School District*, 584 F.2d 115 (5th Cir.1978) (en banc), *cert. denied*, 441 U.S. 906, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979).

AFFIRMED BY OPERATION OF LAW.

CONSTITUTION OF THE UNITED STATES

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * *

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 28:

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Official Code of Georgia Annotated, Title 24:

24-4-5. Reasonable doubt in criminal cases.

Whether dependent upon direct or circumstantial evidence, the true question in criminal cases is not whether it

is possible that the conclusion at which the evidence points may be false, but whether there is sufficient evidence to satisfy the mind and conscience beyond a reasonable doubt. (Penal Code 1895, § 987; Penal Code 1910, § 1013; Code 1933, § 38-110.)

LOCAL RULES OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA

BILL OF COSTS TO BE FILED BY PREVAILING PARTY

351.1 Time Limit. A bill of costs must be filed by the prevailing party within 30 days after the entry of judgment or such costs will not be allowed to be taxed as a part of the judgment.

Office - Supreme Court, U.S.
FILED
FEB 27 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-1160

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HINSON McAULIFFE, Individually; and JAMES L. WEBB, as Solicitor General for the County of Fulton, State of Georgia,
Petitioners,

v.

PENTHOUSE INTERNATIONAL, LTD.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

GEORGE M. WEAVER
Counsel of Record for Petitioners

Please serve:

GEORGE M. WEAVER
2100 Trust Company Tower
25 Park Place
Atlanta, Georgia 30334
(404) 688-4043

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
I. RESPONDENT'S DESCRIPTION OF THE EXPERT TESTIMONY IS INACCURATE	1
II. THE SUBJECT MATTER JURISDICTION ISSUE IS PROPERLY BEFORE THIS COURT	2
III. THE RECORD IS CLEAR THAT THE DISTRICT COURT EMPLOYED THE REASONABLE DOUBT STANDARD	3
IV. THE IMPORTANCE OF THIS CASE	5
CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

Cases:

Andrus v. Charlestone Stone Products Co., Inc., 436 U.S. 604 (1978)	3
Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977)	3
Pennhurst State School & Hospital v. Halderman, 52 U.S.L.W. 4155 (January 23, 1984)	3
Silber v. United States, 370 U.S. 717 (1962)	3

NO. 83-1160

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HINSON McAULIFFE, Individually; and
JAMES L. WEBB, as Solicitor General for the
County of Fulton, State of Georgia,
Petitioners,

v.

PENTHOUSE INTERNATIONAL, LTD.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

I. RESPONDENT'S DESCRIPTION OF THE EXPERT TESTIMONY IS INACCURATE

In its brief in opposition, respondent inaccurately claims regarding the expert testimony that "the overwhelming effect of the evidence was to demonstrate the film had serious artistic and political value." (Br. in Opp. 4). Respondent then attempts to manipulate the record by citing only the testimony of its experts. The record shows that petitioners offered the testimony of numerous experts on the issues of artistic and political value, as well as on other issues. On the question of prurient appeal, peti-

tioners called Drs. Victor Cline, a respected psychologist and professor at the University of Utah (T. 970), Fred Crawford, an eminent professor of sociology at Emory University (T. 1196), and James Mallory, an Atlanta psychiatrist who was trained at Princeton and Duke Universities (T. 1304).

Petitioners also introduced the testimony of other experts on the question of serious artistic and political value. Msgr. Eugene Clark, former director of communications of the Catholic Archdiocese of New York who has taught in universities and holds the Ph.D. degree from the University of Notre Dame (T. 765). Petitioners also called Drs. James Fletcher, a professor and media-expert at the University of Georgia (T. 1089), Thomas Burns, a professor of ancient history at Emory University (T. 831), and Reo Christenson, a widely-published and distinguished political scientist and professor at the University of Miami (Ohio). (T. 911).

The "overwhelming effect" of the expert testimony was exactly the opposite of what respondent claims. The expert testimony demonstrated that "Caligula" lacks any serious value and, moreover, satisfies the other parts of the obscenity test. It should be noted that petitioners' experts generally testified without charging any fee, whereas Penthouse's experts were paid substantial fees.

II. THE SUBJECT MATTER JURISDICTION ISSUE IS PROPERLY BEFORE THIS COURT

Penthouse says in its brief in opposition that the subject matter jurisdiction issue was not litigated in the district court. It suggests that the matter is not, therefore, properly before this Court. It is true that petitioners did not contest the district court's subject matter juris-

diction while in that forum. Petitioners did raise the issue in the court of appeals.

However, subject matter jurisdiction may be inquired into at any stage in a federal action. In fact, this Court has often held that federal appellate courts have an obligation to examine their jurisdiction even when the issue is never raised by the parties. In *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), the Court noted: "[W]e are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction." *Id.*, at 278. *See also Andrus v. Charlestone Stone Products Co., Inc.*, 436 U.S. 604, 608 n.6 (1978).[1] In the instant case, the issue of subject matter jurisdiction was raised by the Eleventh Circuit panel. On rehearing, petitioners pursued the issue before the court *en banc*.

Unlike Penthouse's assertions, petitioners have never argued that a federal district court has no authority to make factual determinations in a declaratory judgment action. Rather, petitioners have argued that a federal court should not be allowed to decide whether, as a matter of fact, a proposed course of conduct would violate the elements of a state criminal statute. A determination of this sort is not a true federal question.[2]

III. THE RECORD IS CLEAR THAT THE DISTRICT COURT EMPLOYED THE REASONABLE DOUBT STANDARD

Penthouse argues that the record is unclear as to

[1] It should also be noted that federal courts can notice, regardless of the actions of the parties, error which is plain on the face of the record. *Silber v. United States*, 370 U.S. 717, 717-18 (1962).

[2] It is significant that this Court has recently held that the Eleventh Amendment does not allow "a federal suit against state officials on the basis of state law." *Pennhurst State School & Hospital v. Halderman*, 52 U.S.L.W. 4155, 4162 (January 23, 1984).

whether the district court employed the reasonable doubt standard. (Br. in Opp. 14). Penthouse says that the district court does not say in its order that it is using the reasonable doubt standard and, according to Penthouse, petitioners are attempting to mislead the Court. Close inspection of the record shows that the shoe is on the other foot: respondent seeks to mislead the Court.

The record is abundantly clear that the district court applied the reasonable doubt standard. The issue was raised in the proposed pre-trial order and each party filed a brief in support of its position. (R. 167, 230, 253). At the pre-trial conference, which was not recorded inasmuch as all disputed issues would become matters of record at the trial, the district court orally announced that it rejected McAuliffe's position and would apply the reasonable doubt standard. At the trial, the court in both its preliminary and final charges instructed the jury to apply a reasonable doubt standard. (T. 8, 1511). The district court even incorporated the reasonable doubt standard in the language of the special verdict form submitted to the jury—i.e., the jury was asked if it found that there was a reasonable doubt as to any of the enumerated elements of the obscenity test. (R. 299). In its final order, the district court specifically pointed out that the jury had been instructed to apply the reasonable doubt standard. (R. 344 n.4).

The straw at which respondent grasps is the fact that the district court did not expressly say that it was using the reasonable doubt standard but simply said that it found the movie not to appeal to a prurient interest and not to lack serious artistic and political value. Even this straw disappears when one considers that the district court described the findings of the jury in the same terms,

although as noted above its findings were actually expressed in reasonable doubt language. Moreover, the lower court also said:

> This court finds, as did the advisory jury, that to the average person applying contemporary community standards, the film *Caligula*, viewed in its entirety, does not appeal to the prurient interest in sex. (R. 331-32).

The significance of this is two-fold: it shows that the district court employed the same standard as did the jury and it demonstrates that the lower court relied on the findings of the jury. Finally, it should be emphasized that the only circuit judge to address this issue observed that it is only reasonable to conclude that the district court employed the reasonable doubt standard. 702 F.2d at 930.

IV. THE IMPORTANCE OF THIS CASE

Penthouse has said nothing to diminish the importance of this case. It has not challenged McAuliffe and Webb's description of the unusual aspects of this movie and its distribution. "Caligula" is probably the boldest hard core pornographic film in history and has been distributed on an unprecedented scale. Certainly, if the obscenity laws are to be taken seriously and are to have any effect they must be correctly applied in, of all cases, this case. Numerous serious and important issues regarding their application have been raised in the petition. Indeed, the split on the Eleventh Circuit demonstrates the presence of such issues. Unlike Penthouse's suggestion, lower courts cannot insulate themselves from Supreme Court review by failing to publish their opinions.

Penthouse's argument that certiorari has never been granted to review a finding of non-obscenity in a lower

court should also be mentioned. As is clear from the petition, McAuliffe and Webb do not ask this Court simply to review factual findings made in an obscenity case. Rather, petitioners contend that the lower courts in significant and important ways misinterpreted and misapplied the Georgia obscenity law and previous decisions of this Court. It should not be forgotten, moreover, that petitioners' first point is that there really is no subject matter jurisdiction here. Petitioners do not know if the Court has ever reviewed a case like this before. However, it is important to note that the vast majority of findings of non-obscenity occur in criminal cases. And, of course, the Double Jeopardy Clause forbids the government from appealing such verdicts. McAuliffe and Webb agree that this case presents a special and unusual opportunity for review. For that reason, the writ should be granted.

Respectfully Submitted,

s/

GEORGE M. WEAVER
Counsel of Record for Petitioners

Please serve:

GEORGE M. WEAVER
2100 Trust Company Tower
25 Park Place
Atlanta, Georgia 30334
(404) 688-4043

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 1984, three copies of the foregoing petitioners' reply brief were mailed, postage prepaid, to:

James L. Paul, Esq.
3900 First Atlanta Tower
Atlanta, Georgia 30383

Norman Roy Grutman, Esq.
505 Park Avenue
New York, New York 10022

Bruce A. Taylor, Esq.
Paul C. McCommon, Esq.
2331 W. Royal Palm Road, #105
Phoenix, Arizona 85021
Counsel for Amici

I further certify that under S.Ct. Rule 28 further service is not required.

GEORGE M. WEAVER

(THIS PAGE INTENTIONALLY LEFT BLANK)

MOTION FILED
JAN 19 1984

Case No. 83-1160

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

HINSON McAULIFFE, Individually, and JAMES L. WEBB, as Solicitor General for the County of Fulton, State of Georgia,

Petitioners,

v.

PENTHOUSE INTERNATIONAL, LTD.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE BY CHARLES H KEATING, JR., AND CITIZENS FOR DECENCY THROUGH LAW, INC., IN SUPPORT OF THE PETITION, AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS HINSON McAULIFFE AND JAMES L. WEBB

BRUCE A. TAYLOR
PAUL C. McCOMMON, III
Citizens for Decency
through Law, Inc.
2331 W. Royal Palm Road, #105
Phoenix, Arizona 85021
(602) 995-2600
Attorneys for Amici

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE BY CHARLES H KEATING, JR., AND CITIZENS FOR DECENCY THROUGH LAW, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI	1
BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS	8
REASONS FOR GRANTING THE WRIT ...	8
SUMMARY OF ARGUMENT	20
LAW AND ARGUMENT	23
I. WHETHER A FEDERAL DISTRICT COURT MAY PROPERLY DECIDE THE OBSCENITY VEL NON UNDER STATE LAW OF A SEXUALLY EXPLICIT MOTION PICTURE WHICH IS NOT PROTECTED SPEECH AS A MATTER OF FEDERAL CONSTITUTIONAL LAW. ..	23
II. WHETHER, ASSUMING A FEDERAL DISTRICT COURT HAS JURISDICTION TO DETERMINE OBSCENITY UNDER STATE LAW, SUCH A COURT MAY PROPERLY APPLY A REASONABLE DOUBT STANDARD OF PROOF WHERE STATE CIVIL REMEDIES ARE AVAILABLE WHICH WOULD NOT REQUIRE PROOF BEYOND A REASONABLE DOUBT AND WHEN THIS COURT HAS SPECIFICALLY RULED THAT THE REASONABLE DOUBT STANDARD IS NOT REQUIRED IN SUCH PROCEEDINGS.	28

Page

III. WHETHER, ASSUMING JURISDICTION TO DETERMINE OBSCENITY UNDER STATE LAW, THE PRURIENT INTEREST TEST OF OBSCENITY REQUIRES THAT SEXUALLY EXPLICIT MATERIAL APPEAL TO OR SEXUALLY STIMULATE - AS OPPOSED TO OFFEND AND REPULSE - THE AVERAGE PERSON. 31

IV. WHETHER, ASSUMING JURISDICTION TO DETERMINE OBSCENITY UNDER STATE LAW, THE SERIOUS VALUE TEST OF OBSCENITY WAS PROPERLY CONSTRUED AND APPLIED IN THIS CASE. 35

V. WHETHER COSTS MAY BE CAST AGAINST A STATE PROSECUTOR IN HIS INDIVIDUAL CAPACITY WHEN, ACTING IN GOOD FAITH AND WITH PROBABLE CAUSE, HE DECLARES HIS INTENTION TO ENFORCE A VALID STATE CRIMINAL STATUTE. 37

CONCLUSION 39

APPENDIX A: Profile Of Petitioner Hinson McAuliffe 41

APPENDIX B: Representative Cases From Fulton County, Georgia, Which Were Affirmed On Appeal ... 47

CERTIFICATE OF SERVICE 49

TABLE OF AUTHORITIES

Cases	Pages
Blount v. Rizzi, 400 U.S. 410 (1971)	29
Cooper v. Mitchell Brothers, 454 U.S. 90 (1981)	20,29
Freedman v. Maryland, 380 U.S. 51 (1965)	29
Ginzburg v. United States, 383 U.S. 463 (1966)	33,35
Goldstein v. Allain, Attoreny General, ___F.Supp. ___ (N.D. Miss. 1983)	18
Imbler v. Pachtman, 424 U.S. 409 (1976)	38
Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968)	28
Jenkins v. Georgia, 418 U.S. 153 (1974)	26
Kingsley Books v. Brown, 354 U.S. 436 (1957)	29
Miller v. California, 413 U.S. 15 (1973)	16, 31-32
Mishkin v. New York, 383 U.S. 502 (1966)	31,32

	Pages
Moore v. Sims, 442 U.S. 415 (1979)	27
Paris Adult Threatre I. v. Slaton, 413 U.S. 49 (1973)	29
Penthouse International, Ltd., v. McAuliffe, 702 F.2d 925 (11th Cir. 1983)	23,25
Pinkus v. United States, 436 U.S. 293 (1978)	33
Roth v. United States, 354 U.S. 476 (1957)	16,31
Splawn v. California, 431 U.S. 595 (1971)	22,33, 35
Steffel v. Thompson, 415 U.S. 452 (1974)	26
Miscellaneous	
28 U.S.C. Section 1343	37
28 U.S.C. Section 1983	37
28 U.S.C. Section 2106	12,13

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

HINSON McAULIFFE, Individually, and JAMES L. WEBB, as Solicitor General for the County of Fulton, State of Georgia,

Petitioners,

v.

PENTHOUSE INTERNATIONAL, LTD.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE BY CHARLES H KEATING, JR., AND CITIZENS FOR DECENCY THROUGH LAW, INC., IN SUPPORT OF THE PETITION

Charles H Keating, Jr., and Citizens for Decency through Law, Inc., the Moving Parties herein, respectfully move this Honorable United States Supreme Court, pursuant to Court Rule 36, for leave to file a brief as Amici Curiae in support

of the Petitioners. Consent was granted by Petitioners but has not been granted by Respondent.

Moving Parties have a special and fervent interest in the subject matter of this appeal, having devoted considerable time, study, and effort to assisting federal and state law enforcement authorities over the past twenty-seven years in the enforcement of laws regulating and combating the commercial exploitation of obscene materials within this country. Charles Keating is the founder and co-counsel for Citizens for Decency through Law, Inc., formerly Citizens for Decent Literature, Inc., an Ohio corporation with over one hundred thousand contributors and supporters and with chapter affiliates throughout the United States. Citizens for Decency through Law, Inc. (CDL), is a non-profit, non-sectarian, and non-political

organization with its national headquarters formerly located in Cleveland, Ohio, now located at 2331 W. Royal Palm Road, Phoenix, Arizona, formed for and dedicated to the support of effective and rational obscenity laws and the efforts of governing legislative bodies in the passage of obscenity legislation through public education, the dissemination of existing and proposed obscenity laws, and lending legal assistance to prosecutors and law enforcement personnel.

Mr. Keating was also a member of the Presidential Commission on Obscenity and Pornography. Responding to the opening statement of Public Law 90-100, "The Congress finds that the traffic in obscenity and pornography is a matter of national concern.", Moving Party authored and released his findings in the "Report of Charles H Keating, Jr., Commissioner",

which explained the workings of the Commission and the wealth of statistical information and human experiences which prove the relationship between the purveyance of obscenity to crimes and other anti-social behavior. (Report released September 30, 1970.)

That Moving Party's personal efforts, and those of CDL, are shared on a national level is evidenced by the membership of one hundred forty-six past and present members of Congress and state governors, as well as respected and dedicated clergy, educators, prosecutors, media personnel, and corporate officers, who join in the function and goals of CDL and Mr. Keating.

The extent of Moving Party's involvement in the actual enforcement of obscenity laws is evidenced by his having been plaintiff on behalf of the State of Ohio in an obscenity nuisance abatement

action which was affirmed by the Supreme Court of Ohio, State of Ohio, ex rel. Charles H Keating, Jr. v. A Motion Picture Film Entitled "Vixen", et al., 27 Ohio St.2d 278, 272 N.E.2d 137 (1971), affirmed on remand from this Court, 35 Ohio St.2d 215, 301 N.E.2d 880 (Sept. 26, 1973).

CDL and its affiliated attorneys have filed over fifty briefs in this Court, both on the merits and as amici curiae, including: Jacobellis v. Ohio, 378 U.S. 184, 12 L.Ed.2d 793, 1333 (1964); Memoirs v. Massachusetts, 383 U.S. 413, 16 L.Ed.2d 1, 1052 (1966); Ginzburg v. United States, 383 U.S. 463, 16 L.Ed.2d 31, 1079 (1966); Mishkin v. New York, 383 U.S. 502, 16 L.Ed.2d 56, 1082 (1966); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 37 L.Ed.2d 447, 1110 (1973); Heller v. New York, 413 U.S. 483, 37 L.Ed.2d 745, 1225 (1973); Jenkins v.

Georgia, 418 U.S. 153, 41 L.Ed.2d 642, 1295 (1974); Marks v. United States, 430 U.S. 188, 51 L.Ed.2d 260 (1977); Splawn v. California, 431 U.S. 595, 52 L.Ed.2d 606, 883 (1977); Vance v. Universal Amusement Co., 445 U.S. 308, 63 L.Ed.2d 413 (1980); and Flynt v. Ohio, 451 U.S. 619, 68 L.Ed.2d 489 (1981).

Moving Parties hope to urge as amici that a grave misjustice has been done to these particular state prosecutors and, because of their integrity and dedication, they deserve this Courts' special notice to review serious and important legal issues which constantly plague prosecutors and local governments in the honest enforcement of obscenity laws.

It is sincerely hoped that this Court will grant our Motion for Leave to File a Brief as Amici Curiae and allow us to participate in this cornerstone case

which presents important issues for all the people of the United States as well as those of Fulton County, Georgia.

Respectfully submitted,

CHARLES H KEATING, JR.
CITIZENS FOR DECENCY
THROUGH LAW, INC.
Amici Curiae

By: _____
Bruce A. Taylor

_____
Paul C. McCommon, III

Counsel for Amici

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

HINSON McAULIFFE, Individually, and JAMES L. WEBB, as Solicitor General for the County of Fulton, State of Georgia,

Petitioners,

v.

PENTHOUSE INTERNATIONAL, LTD.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICI CURIAE
IN SUPPORT OF PETITIONERS

REASONS FOR GRANTING THE WRIT

Amici submit that the Supreme Court must review this case because the Petitioners were denied their right to an appeal by the Court of Appeals and there is no other remedy available to the state prosecutors but a review in this Court.

Petitioner Hinson McAuliffe is an honorable and faithful public servant who has consistently and lawfully enforced the obscenity laws and deserves special consideration because of his stature and integrity. A profile of Mr. McAuliffe is included in Appendix A. Mr. Webb, his successor, was a dedicated member of this office and will continue the tradition of full and fair enforcement of the law.

The Fulton County Solicitor's Office has been the most successful law enforcement agency in the United States against the widespread commerce in hard-core pornography, making Atlanta only the second major American city after Cincinnati, Ohio, to completely remove hard-core obscenity by successful law enforcement, through several years of effort and hundreds of hard earned convictions. Only Jacksonville and Orlando, Florida, have been able to

likewise stop all obscenity law violations since. Numerous cities, including Buffalo, San Antonio Houston, Boston, Cleveland, Memphis, Miami, Ft. Lauderdale, Denver, Colorado Springs, Chicago, Louisville, Newport (Ky.), Rochester, Los Angeles, San Francisco, Spokane, Seattle, Phoenix, and New York have put forth valiant efforts to enforce valid laws against an increasingly powerful and wealthy pornography syndicate and its organized crime activities. The legal efforts have been difficult and not successful enough, due to an undue amount of clear guidance and support from the courts.

The instant case presents a good example of these problems and a golden opportunity to clarify central points of law to guide future cases. After being denied a fair trial in the federal district court by the District Judge's

misapplication of obscenity law in improperly defining "prurient appeal" and imposing a burden of proof on the civil defendants of "beyond a reasonable doubt", the state prosecutors obtained a judgment of reversal by a three-judge Panel of the Eleventh Circuit on April 11, 1983. (The Panel opinion is set out at pages 2-14 in the Appendix of the Petition, and is reported at 702 F.2d 925.)

However, the Eleventh Circuit subsequently granted a rehearing en banc, and by its local rules treated the Panel opinion as null and void. The en banc Court was thereafter unable to reach a decision on the merits and refused to reinstate the Panel decision. Instead, the en banc ruling of October 17, 1983, stated that the judgment of the district court was affirmed "by operation of law". This result denies the federal

defendants, McAuliffe and Webb, of Due Process by refusing to grant them any appeal as guaranteed by 28 U.S.C. Section 2106.

Had this case arose in another federal circuit made up of an odd number of judges, this result could not have occurred, also denying the state prosecutors of Equal Protection. This Court, in its supervisory capacity over the federal courts of appeals should hold that an en banc review must consist of an odd number of Circuit judges. In some circuits, this would be the natural situation (D.C, 2nd, 4th, 5th, 6th, and 9th Circuits). In the remaining circuits (1st, 3rd, 7th, 8th, 10th, and 11th Circuits), a senior judge should be chosen at random, or a district judge appointed. This would insure that an en banc ruling would reach a decision one way or the other and prevent an appellant

from losing by the default of the court of appeals rather than on the merits of the law. Another solution would be to treat the granting of a rehearing en banc as merely vacating the panel decision pendente lite, and if the en banc court was unable or unwilling to reach a definitive decision, to reinstate the panel's judgment "by operation of law" rather than reinstating the district court's earlier decision.

In this case, the reversal by the Panel on April 11, 1983, amounted to a Judgment in favor of the State of Georgia and its prosecutors, which the Eleventh Circuit had no statutory authority to reverse "by operation of law" under a local rule. Section 2106 of U.S.C. Title 28 guarantees that a losing party in a federal district court shall have his case heard by a court of appeals which must "affirm, modify, vacate, set aside

or reverse" the lower court. Section 2106 also allows a court of appeals to remand and direct an appropriate decision or to remand and require further proceedings. Section 2106 does not allow a court of appeals to refuse to exercise one of these statutory options and to leave the parties where it found them. The appellant is entitled to a decision and failing to do so is a clear violation of the Due Process and Equal Protection Clauses.

If this situation arises in a death penalty case, this Court would not allow a state court of appeals or a state supreme court to throw up its hands and refuse to review the sentence. This Court would at least find it necessary to grant a petition for a writ of certiorari in order to provide the required appellate review. That is all Petitioners are asking in this case, and

Amici submits that this factor alone is an overriding reason for granting the writ in this case.

This case also raises important questions of federal interference in state court administration of its criminal and civil statutes. Federal Courts and local governments have been increasingly burdened with civil rights actions by pornographers trying to escape state obscenity statutes, "Detroit type" zoning ordinances, and to pre-litigate newly enacted obscenity statutes and ordinances. This amounts to a real and expensive form of blackmail and intimidation of state legislators, city councilmen, and law enforcement officers in light of the willingness of federal courts to strike local laws and assess hundreds of thousands of dollars in costs and attorneys fees against already strapped local taxpayers. Section 1983

was designed to offer a means of protecting the rights of those who were previously unable to get fair treatment in some state courts because of their race, color, or creed. It was not envisioned as a tool for criminal pornographers to delay or avoid state prosecutions under valid laws, especially where the state laws are patterned directly after the controlling decisions of this Supreme Court, as Georgia's law is patterned upon Miller v. California, 413 U.S. 15, at 24-25 (1973).

This case also presents a first time opportunity to establish rules of law to govern the questions of "prurience", "community standards", and "serious value". Not since 1957, in Roth v. United States, 354 U.S. 476, footnote 20, has this Court given a definition of the word "prurient". In that case this Court said it was a "tendency to arouse lustful

thoughts", but also mentioned with apparent approval the ALI adjectives of "shameful or morbid interest". The state and federal courts have argued ever since that one or the other or both is correct. This Court has also never clarified whether a film or book must "appeal to" a lustful, shameful, or morbid interest of an average person or whether Miller was objectively requiring that the hypothetical "average person" must judge whether the appeal of the film or book is to a lustful or shameful and morbid type of sexual interest. Amici and prosecutors read this Court's decisions as requiring the latter application, but the pornographers (and the district court below in this case) have maintained the former. Now is the time for this Court to simply put this controversy to a resolution and thereby guide the trial and appellate courts on this most

important question in obscenity trials. (A federal district court recently struck down the new state obscenity statute of the State of Mississippi because it defined prurient as a "lustful, erotic, shameful, or morbid interest". The court held that only "shameful and morbid" could be used. Goldstein v. Allain, Attorney General, ___ F.Supp. ___ (N.D. Miss. 1983), on appeal to the Fifth Circuit, No. 83-4452.)

There were so many instances in this case where the state prosecutor was denied his right to a fair trial and denied the right to introduce evidence and have the case tried under proper state or federal law that it would be a travesty of justice for this Court to allow the district court result to be sustained without any consideration by an appellate court. The Panel of the Court of Appeals reached at least a fair and

guiding conclusion, and only a mistake of circumstances prevented this result or any other review to intervene. Hinson McAuliffe was the obvious target of Penthouse's anger and contempt because he was enforcing the law against obscene materials successfully. Mr. McAuliffe had reversed this same District Judge once before against Penthouse and their efforts to pander a hard-core movie full of sadism, defecation, and deviant sexual acts should not be allowed to prevail without the review of an appellate court. This whole case cries out for notice, and Amici submits and pleads that this Court will not wash its hands of it as well.

SUMMARY OF ARGUMENT

The District Court erred in accepting full jurisdiction of this action and in litigating factual issues of obscenity under "state law" and then not following the law of the state in making its determination.

The District Court improperly employed the criminal burden of proof, "beyond a reasonable doubt", in a civil case and imposed the burden of proof on the federal defendant to prove a negative. Cooper v. Mitchell Brothers, 454 U.S. 90 (1981), controls on this issue and requires a summary reversal on this point alone.

Appeal to a prurient interest is a concept requiring a fact finder to decide the intended appeal of the work as toward or exploiting a lustful, erotic, shameful, or morbid interest, regardless of whether the work would stimulate or

create such an interest in an average person or any particular person such as a judge or juror. The District Court erred in directing that "Caligula" must appeal to or stimulate a prurient interest of an average persons rather than requiring, under Miller, that an average person must find that the work appealed to a prurient type of sexual interest generally. The District Court's instructions in this regard misled the advisory jury, and led to the jury's erroneous finding that the movie was not legally obscene because it did not appeal to the average person's prurient interest. The District Court erred in failing to overrule the advisory jury on this point.

The District Court also erred when it overruled the jury's finding that the film lacked any serious value. The District Court instead ruled that it did have serious political and artistic

value, without giving the State the opportunity to introduce evidence of pandering to prurient appeal as sanctioned by Splawn v. California, 431 U.S. 595 (1977).

It would, finally, be grossly unfair to allow this case to return to the District Court for the assessment of costs and attorneys fees without the benefit of any appellate review and in light of the circumstances of this case. The state prosecutors who will be individually and officially liable for paying Penthouse an enormous sum for costs and attorneys fees were honestly and lawfully performing their elected responsibilities and should not be a target for mistreatment in the federal courts. Only this Court can prevent this unlawful and unjust result.

LAW AND ARGUMENT

I

WHETHER A FEDERAL DISTRICT COURT MAY PROPERLY DECIDE THE OBSCENITY VEL NON UNDER STATE LAW OF A SEXUALLY EXPLICIT MOTION PICTURE WHICH IS NOT PROTECTED SPEECH AS A MATTER OF FEDERAL CONSTITUTIONAL LAW.

Presented in this case is a serious intrusion by the District Court into a matter clearly within the sovereign power of the State of Georgia in violation of prior decisions of this Court and of the Eleventh Amendment to the Constitution of the United States. This improper exercise of jurisdiction by the District Court was discussed in detail by the Eleventh Circuit in the Panel decision which was nullified when the Eleventh Circuit agreed to an en banc consideration of the case. Penthouse International, Ltd. v. McAuliffe, 702 F.2d 925 (11th Cir. 1983) (Set out in the Appendix of the Petition).

At issue in this case is the application of a state criminal obscenity statute which has been determined constitutionally valid on numerous occasions by this Court. Fearing that Mr. McAuliffe would initiate some form of legal action against an exhibition of their film "Caligula" if the film was distributed in or around Atlanta, Fulton County, Georgia, Penthouse filed a lawsuit against Mr. McAuliffe in the district court alleging violations of constitutional rights and seeking an injunction and a declaration of whether the state criminal obscenity statute could be properly applied to the film "Caligula". The District Court held a two-week trial, received evidence relating to the application of the state statute to the film, and declared that the film did not violate state law. It is the position of Amici that the Panel

decision of the Eleventh Circuit was correct in stating that to allow such a cause of action would "countenance the bypass of the entire state criminal justice system", and that "[n]otions of comity and federalism preclude us from recognizing such a cause of action, especially in an area in which local community standards are so crucial". Id., 702 F.2d at 928.

If the district court had jurisdiction to decide any aspect of this case, its jurisdiction did not extend beyond that which was described in the Eleventh Circuit Panel opinion. The Panel held that the district court could only determine whether "Caligula" was not obscene as a matter of law, that this should have been Penthouse's burden but was not, and any further action by the district court was improper. This analysis is consistent with this Court's

decision in Jenkins v. Georgia, 418 U.S. 153 (1974), and would allow a district court to make a declaration whether a film was protected by the First Amendment as a matter of federal constitutional law, but if factual issues are present, then "notions of comity and federalism" would require the court to dismiss the case and refrain from any further exercise of jurisdiction, thus allowing the state to properly apply and resolve issues of state law in a state court. Such a result would be in accordance with the recognition of state sovereignty as expressed in the Eleventh Amendment. Such a result would also be in accordance with this Court's decision in Steffel v. Thompson, 415 U.S. 452 (1974), where a cause of action for declaratory relief was recognized by this Court, but no factual issues required resolution.

In conclusion, the District Court acted in disregard of the sovereign power of the State of Georgia to litigate violations of state criminal statutes in state courts. If this Court approves the action of the District Court, it is difficult to perceive any logical stopping place to a line of reasoning that would allow such a cause of action as is presented in this case where a state criminal matter was decided, in advance, in a federal court. If this Court does not grant the Petition for a writ of certiorari in this case, it will be recognizing a cause of action which allows the "trial" of a state criminal matter in federal court, in total disregard of long-standing principles of deference and respect for state criminal justice systems as recognized by this Court in Moore v. Sims, 442 U.S. 415, 425-30 (1979).

II

WHETHER, ASSUMING A FEDERAL DISTRICT COURT HAS JURISDICTION TO DETERMINE OBSCENITY UNDER STATE LAW, SUCH A COURT MAY PROPERLY APPLY A REASONABLE DOUBT STANDARD OF PROOF WHERE STATE CIVIL REMEDIES ARE AVAILABLE WHICH WOULD NOT REQUIRE PROOF BEYOND A REASONABLE DOUBT AND WHEN THIS COURT HAS SPECIFICALLY RULED THAT THE REASONABLE DOUBT STANDARD IS NOT REQUIRED IN SUCH PROCEEDINGS.

The District Court ruled that plaintiff Penthouse's burden of proof in this matter was to merely raise "a reasonable doubt". Mr. McAuliffe, who was the defendant in this civil declaratory action, had the corresponding burden to prove that "Caligula" was obscene "beyond a reasonable doubt". This ruling by the District Court is clearly erroneous and would require a reversal of the decision below because a plaintiff in any case is always charged with the burden of persuasion. The

ruling of the District Court that "beyond a reasonable doubt" was the proper standard of proof in the case disregards prior decisions of this Court and of state courts on the issue. This Court has held on numerous occasions that civil regulation of obscenity is permissible, and has never held that the burden of proof in a civil proceeding must be the "reasonable doubt" standard which is applicable to criminal cases. See: Freedman v. Maryland, 380 U.S. 51 (1965); Kingsley Books v. Brown, 354 U.S. 436 (1957); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); Blount v. Rizzi, 400 U.S. 410 (1971); and Paris Adult Theatre I v. Slaton, 413 U.S. 49, 55 (1973).

The ruling of the District Court on the burden of proof issue is directly in conflict with this Court's decision in California ex rel. Cooper v. Mitchell

Brothers' Santa Ana Theatre, 454 U.S. 90 (1981) where this Court held that it has never required the "beyond a reasonable doubt" standard in a civil case. The District Court Judge had been informed of this case in the State's trial brief on this issue.

It is the position of Amici that the District Court's error on this issue is sufficient, standing alone, to warrant the granting of the Petition in this case and the reversal of the District Court decision. The application of the erroneous standard of proof clearly was in opposition to prior decisions by this Court and clearly violated the State's and Petitioners' rights to a fair resolution of the issues in the District Court.

III

WHETHER, ASSUMING JURISDICTION TO DETERMINE OBSCENITY UNDER STATE LAW, THE PRURIENT INTEREST TEST OF OBSCENITY REQUIRES THAT SEXUALLY EXPLICIT MATERIAL APPEAL TO OR SEXUALLY STIMULATE--AS OPPOSED TO OFFEND AND REPULSE--THE AVERAGE PERSON.

The "prurient interest test" is central to obscenity law and is usually the most vigorously contested point between the prosecutors and the pornographers wherever in the country an obscenity trial takes place. This Court, Amici submits, made clear in Roth v. United States, 354 U.S. 476, footnote 20 (1957), Mishkin v. New York, 383 U.S. 502, 508 (1966), and Miller v. California, 413 U.S. 15, 30 (1973), that prurience is a legal term of art meaning a "lustful", "erotic", or "shameful or morbid" type of sexual interest which must be found to be the predominant or "as a whole" appeal or direction of an

obscene book or film. As stated in Miller, supra at 30:

> [T]riers of fact are asked to decide whether "the average person, applying contemporary community standards" would consider certain materials "prurient"... (Emphasis added)

This Court did not ask courts to make juries find that hard-core pornography appeals to or sexually stimulates such a prurient interest in an average person or in the jury itself, as the District Court below instructed in this case. Mishkin, supra at 508, specifically holds to the contrary of such an instruction:

> Indeed, appellant's sole contention regarding the nature of the material is that some of the books involved in this prosecution, those depicting various deviant sexual practices, such as flagellation, fetishism, and lesbianism, do not satisfy the prurient-appeal requirement because they do not appeal to a prurient interest of the "average person" in sex, that "instead of stimulating the

> erotic, they disgust and sicken." We reject this argument as being founded on an unrealistic interpretation of the prurient-appeal requirement.

This Court's correllative rulings in Ginzburg v. United States, 383 U.S. 463, 466-68 (1966), Hamling v. United States, 418 U.S. 87, 129-30 (1974), Splawn v. California, 431 U.S. 595, 598 (1977), and Pinkus v. United States, 436 U.S. 293, 303-04 (1978), further illustrate the true nature of prurient appeal and provide for evidence of commercial exploitation, or "pandering", to satisfy a finding of obscenity vel non and to show that any claim of redeeming or serious value would be inappropriate. The District Court below instructed the jury, findings, and employed in its findings, an erroneous interpretation of prurience, to the great detriment of the State and Petitioners, and should be

overruled. This Court should take this opportunity to declare that the "prurient interest" includes a "lustful", an "erotic", and a "shameful or morbid" interest in nudity, sex or excretion and that the true test is whether an "average person" would judge the appeal of the work, as a whole, to be to such a prurient type of sexual interest. Such a ruling by this Court would greatly assist both federal and state trial courts and settle a 25 year old controversy on this point between law enforcement and legislatures versus the pornography industry and its representatives.

IV

WHETHER, ASSUMING JURISDICTION TO DETERMINE OBSCENITY UNDER STATE LAW, THE SERIOUS VALUE TEST OF OBSCENITY WAS PROPERLY CONSTRUED AND APPLIED IN THIS CASE.

The application of the "serious value" test by the District Court in this case is not an accurate reflection of proper obscenity law because the trial court allowed Penthouse to prevail only by showing a reasonable doubt as to value, not to establish that the film "Caligula" in fact had serious value. Furthermore, the District Court denied the State the right to introduce relevant evidence of "pandering" to prurient interests as a defense to the claims of value, in direct contradiction to the rules of evidence established by this Court in Ginzburg v. United States, 383 U.S. 463 (1966) and Splawn v. California, 431 U.S. 595 (1977). Among other

evidence, the District Court refused to allow the State to introduce the May and June, 1980, issues of Penthouse Magazine, which contained the Plaintiff-Respondent's own account of the making of the movie and photo scenes of hard-core sex, violence, mutilation, and deviance taken from the film in question.

At a minimum, the District Court should have required the federal Plaintiff, Penthouse, to establish that its film was constitutionally protected as a matter of law, including that it had serious value. This was the reasoned opinion of the Panel decision of April 11, 1983, and its analysis of the law is both fair and consistent with this Court's decisions and should be considered by this Court in the review of this Petition.

V

WHETHER COSTS MAY BE CAST AGAINST A STATE PROSECUTOR IN HIS INDIVIDUAL CAPACITY WHEN, ACTING IN GOOD FAITH AND WITH PROBABLE CAUSE, HE DECLARES HIS INTENTION TO ENFORCE A VALID STATE CRIMINAL STATUTE.

The District Court improperly cast costs in this action against Mr. McAuliffe because it erroneously recognized a cause of action by Penthouse under the federal civil rights statutes, 28 U.S.C. §§ 1343, 1983. As stated earlier, the District Court should only have declared whether the film "Caligula" was protected as a matter of law. Any further action by the District Court was an improper exercise of jurisdiction, and no cause of action should have been sustained under § 1983 for Penthouse because no civil rights had been violated, as the statute requires.

It is also the position of Amici that the policy and reasoning of this

Court in the case of Imbler v. Pachtman, 424 U.S. 409 (1976) prevent casting costs and attorneys fees against Mr. McAuliffe, even if this Court should determine that some cause of action was stated under § 1983. Mr. McAuliffe's prosecutorial immunity should protect him from an award of "costs" in this case, where any reasonable prosecutor who has taken an oath to uphold the laws of the State of Georgia "could have believed there was probable cause that those who would be involved in the exhibition of 'Caligula' in Fulton County, Georgia, would be violating the Georgia obscenity statute as constitutionally applied". See, Panel Opinion of Eleventh Circuit, 702 F.2d at 928.

CONCLUSION

Amici is not asking this Court to decide this case at this stage, even though we submit that Petitioners were correct in their interpretation of the law, that the District Court clearly erred in applying obscenity law concepts, and that the federal courts should not have intervened. We are praying only that this Court hear this case, especially since it would be manifestly unfair to prevent the federal defendants, the State of Georgia and its prosecutors, from having any higher court hear its case.

The Petition for a Writ of Certiorari raises essentially one request, that this Supreme Court "do what's right". Amici implores this Court to do so and grant the Writ.

Respectfully submitted,

CHARLES H KEATING, JR.
CITIZENS FOR DECENCY
THROUGH LAW, INC.
Amici Curiae

By: _____
Bruce A. Taylor

_____
Paul C. McCommon, III

Counsel for Amici

APPENDIX A

Profile of Petitioner Hinson McAuliffe

The Honorable Hinson McAuliffe was appointed Solicitor General of the State Court of Fulton County in 1969. He was re-elected to the office on two occasions and served continuously as Solicitor General until his retirement at the end of 1982. While in office, Mr. McAuliffe brought numerous cases each year against bookstores and theaters in Fulton County, Georgia, for violation of the Georgia obscenity laws. In 1977, 62 cases were either tried before juries with resulting convictions or pleas of guilty were obtained. In 1978, 51 cases were successfully prosecuted for violations of the obscenity law in the State Court of Fulton County. In 1979, 141 cases were successfully prosecuted by Mr. McAuliffe's Office for obscenity

violations. In 1980, at least 129 cases were successfully prosecuted under the obscenity law in the State Court. And in 1981, 87 cases were brought by Mr. McAuliffe's Office.

Through the years, the Solicitor's Office had remarkable success in obtaining convictions against those individuals and entities charged with violation of the state obscenity statutes, and virtually all of these convictions were upheld on appeal. The 383 successful prosecutions in 1977-80 evidenced the approval and support of the Georgia juries, courts, and citizens of the efforts of the Solicitor's Office to enforce the laws. In 1979, for example, McAuliffe won 28 of 29 cases that were brought before Fulton County juries for obscenity violations. Not only was the Georgia criminal obscenity law applied successfully by Mr. McAuliffe through the

years, but he also applied the state civil nuisance statute and injunctive remedies against bookstores and theatres which disseminated "hard-core" pornographic material. The use of these civil proceedings was approved by this Court in the case of Paris Adult Theatre I v. Slaton, 413 U.S. 49, 55, rehearing denied, 414 U.S. 881 (1973). Mr. McAuliffe is the "solicitor for the local state trial court" who was mentioned by the Court at page 51 of that opinion. In addition, civil nuisance actions were successfully brought by Mr. McAuliffe against 13 "adult" bookstores and theatres for violation of the state prostitution and public indecency statutes during the years 1980 and 1981.

During his terms in office, Mr. McAuliffe was so successful in the constitutional application of the Georgia obscenity law that in the early part of

1981, all of the remaining bookstores and theatres which dealt in the distribution of hard-core pornographic materials made the decision to close and leave Fulton County. In return, the pending prosecutions were dismissed by the State. Several pornography warehouses had been in operation in Fulton County, and the last of these warehouses also made the decision to leave in 1981. These illegal businesses remained closed for the remainder of Mr. McAuliffe's term in office as State Court Solicitor General.

Mr. McAuliffe was also successful in a prosecution against Mr. Larry Flynt for the distribution of Hustler magazine in Fulton County. The conviction of Mr. Flynt by a Fulton County jury was upheld through the state appellate court system and certiorari was denied in the case by this Court. Flynt v. State of Georgia, 153 Ga. App. 232 (264 S.E.2d 669), cert.

denied, 449 U.S. 888 (1980). Mr. McAuliffe was further successful in an action which was initially brought against him by certain magazine owners in 1979, in the case of Penthouse International, Ltd., et al. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980). Although the same District Court Judge in this case found against Mr. McAuliffe in that case and determined that none of the magazines involved were obscene, the trial court was reversed on appeal by the Fifth Circuit Court of Appeals which determined that certain issues of Penthouse and Oui magazines were obscene under the "Miller Test".

Virtually all of the convictions obtained in the State Court of Fulton County by Mr. McAuliffe were appealed through the state court system and appeal was generally attempted to this Court. The following section of this Appendix

contains a partial list of cases which will indicate the type of cases in which this Court either affirmed the application of the Georgia law by Mr. McAuliffe or where certiorari was denied in the case by this Court.

APPENDIX B

Representative cases from Fulton County, Georgia, which were affirmed On Appeal

1. Teal v. State of Georgia, 143 Ga. App. 47 (238 S.E.2d 128), appeal dismissed for want of a substantial federal question, 435 U.S. 989, 56 L.Ed.2d 79, 98 S.Ct. 1639 (1978)

2. Simpson v. State of Georgia, 144 Ga. App. 657 (242 S.E.2d 265), appeal dismissed for want of a substantial federal question, 439 U.S. 887, 58 L.Ed.2d 233, 99 S.Ct. 241 (1978)

3. Ballew v. State of Georgia, 241 S.E.2d 19, cert. denied, 436 U.S. 962, 57 L.Ed.2d 1129, 98 S.Ct. 3083 (1978)

4. Dobbs v. State of Georgia, 145 Ga. App. 14 (243 S.E.2d 275), cert. denied, 439 U.S. 899, 58 L.Ed.2d 248, 99 S.Ct. 265 (1978)

5. Cargal v. State of Georgia, 144 Ga. App. 238 (241 S.E.2d 8), cert. denied, 438 U.S. 906, 57 L.Ed.2d 1149, 98 S.Ct. 3125 (1978)

6. Adult Bookmart, Inc. v. State of Georgia, 152 Ga. App. 838 (264 S.E.2d 273), cert. denied, 449 U.S. 886, 66 L.Ed.2d 111, 101 S.Ct. 240 (1980)

7. Allen, et al. v. State of Georgia, 144 Ga. App. 233 (240 S.E.2d 754), cert. denied, 439 U.S. 899, 58 L.Ed.2d 247, 99 S.Ct. 264 (1978)

8. Pierce, et al. v. State of Georgia, 145 Ga. App. 680 (244 S.E.2d 589), cert. denied, 439 U.S. 1088, 59 L.Ed.2d 55, 99 S.Ct. 869 (1979)

9. Whisenhunt v. State of Georgia, 146 Ga. App. 571 (246 S.E.2d 691), cert. denied, 443 U.S. 903, 61 L.Ed.2d 871, 99 S.Ct. 3094 (1979)

10. Maxwell, et al. v. State of Georgia, 152 Ga. App. 776 (264 S.E.2d 254), cert. denied, 449 U.S. 889, 66 L.Ed.2d 114, 101 S.Ct. 245 (1980)

11. Wood v. State of Georgia, 144 Ga. App. 236 (240 S.E.2d 743), cert. denied, 439 U.S. 899, 58 L.Ed.2d 247, 99 S.Ct. 265 (1978)

12. Hays v. State of Georgia, 145 Ga. App. 65 (243 S.E.2d 263), cert. denied, 439 U.S. 947, 58 L.Ed.2d 339, 99 S.Ct. 341 (1978)

13. Hostetler v. State of Georgia, 145 Ga. App. 55 (243 S.E.2d 256), cert. denied, 439 U.S. 947, 58 L.Ed.2d 339, 99 S.Ct. 341 (1978)

14. Speight v. State of Georgia, 148 Ga. App. 87 (251 S.E.2d 36), cert. denied, 444 U.S. 886, 62 L.Ed.2d 117, 100 S.Ct. 180 (1979)

15. Stancil, et al. v. State of Georgia, 155 Ga. App. 731 (272 S.E.2d 511), cert. denied, 451 U.S. 975, 68 L.Ed.2d 357, 101 S.Ct. 2058 (1981)

16. Showcase Cinemas, Inc., et al. v. State of Georgia, 156 Ga. App. 225 (274 S.E.2d 578), writ of certiorari dismissed under Rule 53, 451 U.S. 934, 68 L.Ed.2d 343, 101 S.Ct. 2037 (1981)

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Motion and Brief were mailed, U.S. Postage prepaid, to each of the following counsel for Petitioners and Respondent on this 16th day of January of 1984.

HON. MICHAEL J. BOWERS
Attorney General of Georgia
Assistant Attorney General
132 State Judicial Building
40 Capitol Square
Atlanta, Georgia 30334
(404) 656-2976

and

GEORGE M. WEAVER, ESQ.
Assistant Attorney General
132 State Judicial Building
40 Capitol Square
Atlanta, Georgia 30334
(404) 656-2976

Attorneys for Petitioners

JAMES L. PAUL, ESQ.
Gambrell & Stolz
3900 First Atlanta Tower
Atlanta, Georgia 30383
(404) 658-9150

and

NORMAN ROY GRUTMAN, ESQ.
Grutman & Miller
505 Park Avenue
New York, New York 10022
(212) 888-1900

Attorneys for Respondent

Bruce A. Taylor
Attorney for Amici